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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

Nos. 127, 128.

SECURITY LAND & EXPLORATION COMPANY,
PLAINTIFF IN ERROR,

vs.

G. A. BURNS AND MARY L. BURNS, HIS WIFE,
DEFENDANTS IN ERROR.

SECURITY LAND & EXPLORATION COMPANY,
PLAINTIFF IN ERROR,

vs.

HENRY WECKEY AND ROSALINE S. WECKEY, HIS WIFE,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANTS IN ERROR.

GEORGE P. WILSON,
JOHN R. VAN DERLIP,
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Counsel.

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STATEMENT.

These cases, which are in ejectment, come to this court upon writs of error to the Supreme Court of Minnesota, to review judgments of said court dated July 22, 1902, in favor of the defendants in error (record p. 88), affirming judgments entered in District Court for St. Louis county, Minnesota (record, pp. 76, 77), on the 23rd day of December, 1901, after a second trial pursuant to the Minnesota statute (G. S. 1894, Sec. 5845), the first trial also having resulted in judgments for the defendants in error. The two cases, resting upon similar facts, were tried together below, and are in this court on a single record (record, p. 6). The material facts were stipulated in large measure by the parties, and little other evidence was offered or received upon trial (record, pp. 12-16).

The plaintiff in error is a corporation organized and existing under the laws of Minnesota, and the defendants in the respective suits are husband and wife.

The land involved in the two suits lies in section 4 of township 57 north, of range 17 west of the Fourth Principal Meridian, in St. Louis County, Minnesota, and is a part of a tract of more than one thousand acres of unsurveyed government land abutting upon Cedar Island lake, and indicated upon the government plat of the township *as a part of the lake.* (Record, p. 57, par. 7).

In April, 1876, one Howe, a deputy surveyor, entered into a contract with the United States Surveyor General for Minnesota for the survey of said township, by which he undertook and agreed to survey said township, to run out all section lines, and to set posts marking all section and quarter-section corners throughout the township where the same could be marked upon the ground, and accurately to meander and establish upon the ground meander posts of all lakes and streams found to exist within the township (record, p. 56, par. 2). Thereafter, said Howe ran and marked the east, north and west exterior lines of said township (the south township line having been previously surveyed), and set posts at all section and quarter-section corners on said three exterior lines. He also set a meander post upon the north line of said township where said line running west from the northeast corner of said township first encountered the shore of Cedar Island lake (record, pp. 56-7, par. 3). No survey of the interior of the township was ever made, and no section lines within the township were ever run by Howe, with the possible exception of the west line of section 36; and no section or quarter-section corners were ever located, established or marked by him, with the possible exception of the northwest corner of section 36; none of the streams or permanent lakes (of which there were several) within said township were meandered, no posts of any description were ever set, and no lines or bearing-trees ever blazed within the township, with the possible exception of the corner-post at the northwest corner of section 36 (record, p. 57, par. 4).

Said Howe thereafter made and filed with the U. S. Surveyor General for the state of Minnesota, what purported to be field-notes of a survey of said township made by him under said contract, pur-

1160

porting to give the length and direction of all interior lines, the location of all section and quarter-section posts and the bearing-trees thereof, the character of the soil and timber in said township, and all other data and information required by the U. S. statutes and the rules of the U. S. General Land Office to be ascertained and reported by deputy surveyors in due course of making surveys of public lands. With the exception of the description of the survey of the three exterior boundary lines actually run by him, the field-notes returned by Howe were imaginary and fictitious, and the purported facts and data contained therein were not based upon personal knowledge or inspection of the interior of said township, and were, in fact, false and erroneous (record, p. 57, par. 5, 6). From said purported field-notes it appeared that there existed in the northerly part of said township, lying in sections 2, 3, 4, 9, 10 and 11 thereof, a lake designated as Cedar Island lake, with a surface area of 1,800 acres (record, p. 57, par. 7).

The field-notes and report of survey made and filed by Howe were approved by the U. S. Surveyor General for the district of Minnesota, August 7, 1876, and a plat of said township in accordance with the purported field-notes was made under the direction of the Surveyor General, approved by him on the day named, and a duly certified copy thereof transmitted by him to the local U. S. Land Office and another forwarded to the General Land Office and filed therein August 23, 1876, and accepted by that office as representing a correct survey of the township and as the official plat thereof (record, p. 58, par. 8). What purports to be a true copy of said plat will be found opposite page 72 of the record. It is, however, incomplete, but will be corrected by stipulation.

As a matter of fact, at the time of the survey, Cedar Island lake was, and still is, a body of water not exceeding 800 acres in area; it is a permanent, deep and navigable lake, having high, steep and heavily timbered banks, except about the outlet thereof; it does not in fact, touch section 11 at all, and covers an area of less than twenty acres in the southeast corner of section 4. Between the actual water-line of the lake and the meander line thereof as returned by the purported field-notes of said Howe, there were at the time of the survey, and still are, at least 1,000 acres of high, tillable land, which has never been a part of the lake, and which was, and is,

heavily timbered with trees of more than a century's growth, extending down to the water's edge (record, par. 7, p. 57). Exhibit "B" (inserted between pages 72 and 73 of the record) correctly shows the true outline of Cedar Island lake as it now exists and as it existed at the time of the pretended survey, and its true situation with respect to the meander line returned by said Howe.

A portion of the land in section 4, lying between the reported meander line and the true water-line, is the land in controversy in these actions (record, p. 58, par. 8).

The defendants in error have been in actual and continuous occupancy of the lands involved in these actions since the spring of 1892, under the claim that said lands were and are unsurveyed government lands subject to homestead entry, and have made valuable and lasting improvements upon the lands occupied by them respectively (record, p. 58, par. 9).

According to the plat of said township, the land in section 4 was divided into eight government lots, of which six (6) were fractional, lots 1, 2 and 8 (containing an aggregate of 122.3 acres) comprising all the land in the east half of the section, and lots 3, 4, 5, 6 and 7 (containing an aggregate of 182.8 acres) comprising all of the land in the west half of said section. Between December, 1879, and March, 1887, all of said lots were patented and conveyed by the United States, by patents containing the usual clause, "according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General," and, by mesne conveyances, the title to fractional lots 3, 5, 6 and 7 became vested in the plaintiff in error in the year 1891. According to the township plat and the patents of said lots, they contained, respectively, the following quantities of land: lot 3, 50.87 acres; lot 5, 34.75 acres; lot 6, 30.5 acres, and lot 7, 25.25 acres, a total of 141.37 acres. Plaintiff in error is still the owner thereof and, as such owner, has, within the boundaries of said lots as shown upon said plat and as bounded by the meander line described in the Howe field-notes, the full quantity of land above specified as contained therein (record, pp. 58, 59, par. 10, 11).

The title to government lots 1 and 8 (which are the only lots in the east half of section 4 abutting upon the Howe meander line) became vested, prior to the commencement of these actions, in one

Murphy and his associates, by whom a quit-claim deed was executed and delivered in the year 1892, purporting to grant and quit-claim to the plaintiff in error that part of the southeast quarter of section 4, lying southerly and westerly of a line drawn from the center of said section to the southeast corner thereof, and also all the interest of said grantors in the west half of said section. At the same time, the plaintiff in error executed and delivered to Murphy and his associates a quit-claim deed purporting to convey to them that part of the east half of section 4 lying northerly and easterly of said line drawn from the center of said section to the southeast corner thereof (record, p. 59, par. 11).

In the Burns case, the plaintiff in error claims ownership in fee simple, and the right of immediate possession, of that portion of section four lying west of the north and south center line of the section (record, p. 8), or 320 acres.

In the Weckey case, ownership and right of possession are alleged of that portion of the southeast quarter of section 4 lying westerly and southerly of the straight line drawn from the center to the southeast corner of said section (record, p. 10), or 80 acres, —217.2 acres more than the aggregate quantity (182.8 acres) conveyed by the patents for its five government lots.

If the side lines of lot 1 were extended southerly from the south boundary of said lot, they would encounter the lake in the southeast corner of section 4, and, in that event, lot 1 would appropriate substantially all of the lake frontage in the section, and would contain 139 acres. If the side lines of lot 8 were similarly produced, the east line would encounter Cedar Island lake, but the west line would not, and the lot so extended would contain 106 acres. If the side lines of lot 3 were extended southerly, they would never reach the lake, and the lot so extended would contain 160 acres. If the lines of lot 5 were extended easterly, the northerly line would instantly conflict with the westerly line of lot 3, but if it followed the Howe meander line, and the southerly line of the lot were produced in a straight line, neither would encounter the lake, and the lot so extended would contain 112 acres. If the lines of lot 6 were produced easterly to the section line they would not reach the lake, and the lot would contain 160 acres. If the side lines of lot 7 were extended easterly, the north line would not reach the lake, but the

south line would touch the lake, and the lot so extended would contain 139 acres of land. *But it would be impossible to extend said lots within their respective side lines, as above specified, without instant and irreconcilable interference with each other* (record, pp. 59, 60, par. 12).

The title of plaintiff in error to the fractional government lots 3, 5, 6 and 7 in section 4 is not challenged; hence, in these cases, there is but one

CONTROVERSY PRESENTED.

The ultimate question is: *What are the boundaries of those lots?*

In the consideration of this question, we shall present our argument for the defendants in error under the following general subdivisions:

1. No question but one of boundary is involved in these cases.

2. The Howe survey being fraudulent, the government is affected thereby only so far as it has adopted the survey in the conveyance of its lands in the township.

3. The meander line established by Howe and shown upon the plat is the boundary line of the fractional lots owned by the plaintiff in error.

ARGUMENT.

As preliminary to our discussion, we will state that, in this brief, we employ the term "meander line" for convenient and certain reference to the line constituting the interior boundary of the fractional lots as they are shown upon the plat.

We have received no brief in this court in behalf of the plaintiff in error, and present the case herein for the defendants in error upon the assumption that the contention of the plaintiff in error in this court will be substantially similar to that advanced by it in the Minnesota state courts.

THE CONTENTION OF THE PLAINTIFF IN ERROR

has been that, having bought the fractional lots in reliance upon patents which referred to the township plat, whereon the lots were shown as abutting upon the meander line of Cedar Island lake, such patents and plat *establish conclusively that the lake itself is the boundary of the lots.* The plaintiff in error insists that it is assured by the plat of a frontage upon the lake, and by such assurance is constituted a *riparian proprietor* entitled to pursue the lake until it is encountered, regardless of the facts that no actual survey was ever made; that the field-notes returned by Howe were wholly fictitious and fraudulent; that no lake ever existed at the point indicated by the field-notes or shown upon the plat, and that, by extending its lot lines, the plaintiff in error will acquire more than double the quantity of land which the patents purported to convey. *This theory rests ultimately upon the proposition that the lake is a natural monument which (although confessedly a false one) cannot be disregarded, and must prevail over all other calls of the pretended survey.*

THE CONTENTION OF THE DEFENDANTS IN ERROR.

It is the position of defendants in error that, the survey being fraudulent and the field-notes fictitious, the patents conveyed only the lands lying within the actual lines and distances laid down in the survey, and to the extent of the acreage called for in the patents; that, no body of water existing at the point where the meander line was laid down, the meander line marked the termination of the survey and became the boundary of the fractional lots; that the existence or non-existence of a body of water as the boundary of the fractional lots was a question of fact to be determined by the trial court, and was not concluded by the call for a meander line.

POINT I.

THE ONLY QUESTION INVOLVED IN THESE CASES IS THE INTERIOR BOUNDARY OF THE FRACTIONAL LOTS CLAIMED BY THE PLAINTIFF IN ERROR.

The fractional lots owned by plaintiff in error have their boundaries upon three sides clearly and undeniably fixed by the exterior

lines of the section and the quarter and eighth lines thereof indicated upon the plat. This is not disputed. The boundary upon the fourth side seems to be fixed quite as clearly and undeniably. It is not easy to perceive why, if the plat be conclusive as to three boundaries (for those three boundaries are solely dependent upon their delineation upon the plat), it is not conclusive, also, in respect of the fourth, in view of the conceded fact that Cedar Island lake does not exist, and has never existed, where shown.

Be this as it may, the plaintiff in error *is seeking to establish the interior boundary only* of its premises by asserting that Cedar Island lake is such boundary wherever it may be located. The only line shown upon the plat which the plaintiff in error would change is the meander line. The real question, then, here presented is, as to whether the grant under which plaintiff in error asserts title stops at the meander line shown on the plat or whether it continues beyond that line until the waters of the lake are encountered,—assuming that they could ever be encountered.

Accordingly, it is manifest that the ultimate issue in these cases is one of BOUNDARIES, *and in no possible aspect is any doctrine of* RIPARIAN RIGHTS *involved.* (*In re Burns*, 20 L. D., 28, 31, record, p. 52; *opinion of Judge Cant*, record, p. 62; *opinion of Supreme Court of Minnesota*, record, p. 85; *Bates vs. Illinois Central Railroad Co.*, 1 Black, 204, 207-8; *Horne vs. Smith*, 159 U. S., 40, 41; *Niles vs. Cedar Point Club*, 175 U. S., 300, 308; *Slater vs. Rawson*, 1 Metc. 450, 454; *Lally vs. Rossman*, 82 Wis., 147; *Steinbuchel vs. Lane*, 59 Kan., 10; *Lamprey vs. Mead*, 54 Minn., 290, 299).

The theory of the plaintiff in error, and the authorities which it has cited in this litigation to support that theory, emphasize not only the expediency but the necessity of thus clearly defining the issue. These are suits in ejectment in which the plaintiff in error must stand or fall upon the strength of its own title, and, if there be any doubt as to that title, it must be resolved in favor of the defendants in error, because a doubtful title cannot prevail against possession. Where a survey is uncertain, that construction is to prevail which is most against the party claiming under the survey, because it is his duty to show and establish his boundaries. (*Hill vs. Weir*, 33 Fed., 100; *Scaife vs. Land Co.*, 90 Fed. 238, 247, s. c., 33 C. C. A. 47.)

In the last cited case the Circuit Court of Appeals said:

> "If the plaintiff would recover the land sued for in this action, he must not only show title in himself to the land claimed by him, but he must also show with reasonable certainty that the land which he claims is the land covered by his title papers. To do this, he must show the location of the land described in his title papers."

The mere coincidence that the boundary *claimed* by plaintiff in error chances to be a water boundary does not attach to these cases any question of water-rights.

As this court remarked in *Niles vs. Cedar Point Club, supra,* *"Of course, if the fractional sections did not border on some body of water, there were no riparian rights."*

How far do the lots of plaintiff in error extend? That is the only inquiry, and that is an inquiry as to *boundaries.* In its brief in the state Supreme Court this was conceded by plaintiff in error when it was said:

> "Its [plaintiff in error's] claim is, that, in the direction of the lake, each of these tracts *has only one boundary line,* to-wit, the lake itself; and that the meander line is not a boundary line in any sense or for any purpose."

We are especially insistent upon a clear definition of the issue presented here for the reason that, almost without exception, the authorities which the plaintiff in error has presented to sustain its hypothesis are decisions determining questions of *riparian rights only.*

It has been the constant assertion of plaintiff in error that the meander line is not a factor at all in these cases.

What is a meander line? *Mr. Justice Bradley* said of it:

> The difficulty of following the edge or margin of such projections [the irregularities in the shore-line], and all the various sinuosities of the water-line, is the very occasion and cause of running the meander line which, by its inclusions and exclusions of such irregularities of contour, produces an average result closely approximating to the truth. The official plat made from such survey does not show the meander line, but

shows the general form of the lake adduced therefrom and the surrounding additional lots adjoining and bordering on the same. (*Mitchell vs. Smale*, 140 U. S., 406, 412).

As a consequence, *a true meander line must delimit a stream or body of water*, and if where it is laid down no water exists, or ever has existed, it is not a meander line at all, but must subserve some other end. It is well settled that, in such cases, it marks the termination of the survey and becomes the boundary line of the land which it delimits. (*Granger vs. Swart*, 10 Fed. Cas., 916; *Horne vs. Smith*, 159 U. S. 40; *Niles vs. Cedar Point Club*, 85 Fed. (C. C. A.) 45, affirmed in 175 U. S., 300; *French-Glenn Livestock Co. vs. Springer*, 35 Or., 312, affirmed, 185 U. S., 47; *Fuller vs. Shedd*, 161 Ill., 462, affirmed, *sub nom. Hardin vs. Shedd*, 190 U. S., 508; *James vs. Howell*, 41 O. St., 696; *Lammers vs. Nissen*, 4 Neb., 245; *Bissell vs. Fletcher*, 19 Neb., 745; *Harrison vs. Stipes*, 34 Neb., 431; *Barnhart vs. Ehrhart*, 33 Or., 274; *Glenn vs. Jeffrey*, 75 Ia., 20; *Grant vs. Hemphill*, 92 Ia., 218; *Schlosser vs. Hemphill* (1902) 90 N. W. (Ia.), 842.

There is no question that a *true* meander line is, in law, identical with the water-line which it represents and has no separate recognition. Land bounded by a *true* meander line is, in contemplation of law, bounded by the water-line so depicted. One of the singular features, however, in the contention of the plaintiff in error is, that it refuses—at any rate, fails—to recognize the distinction between *true* meander lines (such as are in question in all the authorities upon which it relies) and false lines laid down (as in the cases at bar) as meander lines, but which neither delimit nor, in fact, have any contiguity to, any body of water, and are merely arbitrary random lines constituting false (and, in this case, purely fictitious) calls in the survey.

The ultimate question involved in these cases being one of *boundaries*, it is palpable that no question of *riparian rights* enters into them, for those are rights which follow, or are connected with, the ownership of land abutting upon streams or bodies of water, and involve the possessory or other rights of such owners in the waters themselves, or in the water-beds. (*Sanborn vs. People's Ice Co.*, 82 Minn., 50; *State vs. St. P. & D. R. R. Co.*, 81 Minn., 424; *Lamprey vs. State*, 52 Minn., 198); hence, before any question of

riparian rights can arise, the person entitled to, or claiming them, must show that he owns the shore; for, if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are obstructions and useless. (*Bates vs. Ill. Central R. R. Co.*, 66 U. S., 204, 208; *Niles vs. Cedar Point Club*, 175 U. S., 300, 308; *Jones vs. Johnston*, 59 U. S., 150, 157.)

The question here is not what rights plaintiff in error may have in or beyond the shore of Cedar Island lake, *but whether it is the owner of the shore.* Is it pretended to the contrary?

This court, therefore, is not called upon to consider any riparian rights of the plaintiff in error, but merely the boundaries of its fractional lots. It follows that a great deal of excellent law upon the former subject must necessarily prove wholly irrelevant and unpersuasive when sought to be applied to the determination of the latter. Moreover, in every case relied upon by the plaintiff in error, the stream or body of water in which riparian rights were claimed had been actually surveyed, and the meander lines described in the surveys and shown upon the plats had been actually laid down with approximate correctness with reference to the actual *situs* of the water.

POINT II.

THE HOWE SURVEY BEING FICTITIOUS AND FRAUDULENT WAS NOT BINDING UPON THE GOVERNMENT, EXCEPT AS IT HAS BEEN ADOPTED AND LANDS HAVE BEEN GRANTED BY REFERENCE TO THE PLAT.

No dispute exists in respect of the fictitious and fraudulent character of the Howe survey (record, par. 4, 5, 6, p. 57; decision of Sec. of Interior, record, p. 52; *Kirwan vs. Murphy*, 189 U. S., 35).

The *Kirwan case* involved the survey now under consideration and practically determines the cases at bar.

Howe, the deputy surveyor, was an agent of the government, having limited powers, both under his contract and under the statute. It is a recognized rule that public agents cannot bind the government by acts outside of, and in violation of, their authority. (*Whiteside et al. vs. United States*, 93 U. S., 247, 257; *Moffat vs. United States*, 112 U. S., 24, 31; *Hume vs. United States*, 132 U. S., 406, 414; *Kirwan vs. Murphy*, 189 U. S., 35, 54).

In the *Hume case* this court said:

"In order to guard the public against losses and injuries arising from the fraud, or mistake, or rashness, or indiscretion, of their agents, the rule requires of all persons dealing with public officers the duty of inquiry as to their power and authority to bind the Government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith, as between themselves and their principal."

In *Moffat vs. United States, supra,* the Government repudiated certain patents for public lands upon the ground that they had been fraudulently issued, and this court declared:

"The position that, as the frauds were committed by officers of the United States, the court erred in not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one. The Government does not guaranty the integrity of its officers nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but servants of the law and, if they depart from its requirements, the Government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it."

Again, in *Whiteside vs. United States, supra,* we find this language:

"Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. * * * Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion might be turned to the detriment and injury of the public. Mayor vs. Eschbach, 18 Md., 282.

1160

"Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act."

In *Kirwan vs. Murphy, supra*, this language was used:

"The administration of the public lands is vested in the Land Department, and its power in that regard cannot be devested by the fraudulent action of a subordinate officer outside of his authority and in violation of the statute."

The theory of the plaintiff in error, that the government is estopped to question its claim, is plainly untenable.

The purpose of showing, or finding, fraud or error in the survey is not to impeach or avoid the patents under which plaintiff in error claims—their validity and efficacy are conceded, but to make clear the situation upon the ground and the facts relative to the pretended survey, in order to arrive at the extent of the grant to the patentees.

(*Cavazos vs. Trevino*, 73 U. S., 773, 784; *Boardman vs. The Lessees, etc.*, 6 Pet., 328, 345.)

It was remarked by this court in *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, 51:

"While it may be conceded that the description of the lots contained in the survey, plats, and patents, are conclusive as against the Government and holders of homesteads so far as the lands actually described and granted are concerned, such conclusive presumption *cannot be held to extend* to lands not included within the lines of the survey, and which are only claimed because of *the alleged existence* of a lake or body of water bounding said lots."

But an estoppel can be no broader than the representation upon which it is sought to be based. The effect of an estoppel is to prevent the party against whom it is invoked from showing the truth; hence arises the rule that an estoppel must be reciprocal, certain as to every intent, and that it cannot be extended by mere argument or inference. (11 *Eng. & Am. Enc. Law (2nd ed.)*, 388.)

Furthermore, it is to be remembered that, where a grant emanates from the sovereign, it is construed more strictly than a grant by a private person. Thus, in *Shively vs. Bowlby*, 152 U. S., 1, 10, *Mr. Justice Gray*, in delivering the opinion of the court, wrote:

> "It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the Crown are to be strictly construed against the grantee contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.' The Rebecca, 5 C. Rob. 227, 230. Many judgments of this court are to the same effect. Charles River Bridge Proprs. v. Warren Bridge Proprs. 36 U. S. 11 Pet. 420, 544-548 (9:773, 822-824); Martin v. Waddell, 41 U. S. 16 Pet. 367, 411 (10:997, 1013); Central Transp. Co. v. Pullman Car Co., 139 U. S. 24, 49 (35:55, 64)."

> "Public grants convey nothing by implication; they are construed strictly in favor of the King." (*United States vs. Arredondo*, 6 Pet., 691, 738.)

Except, therefore, as it has granted lands to *bona fide* purchasers according to the plat made from the fictitious survey, the Government is not bound thereby, and, as to those parts of the township outside the representation made by the lines of the plat, it is in no degree estopped by its patents.

Whether the interior boundary of the lots of the plaintiff in error was an existing lake, was a question of fact for the determination of the trial court, and was not concluded by a mere call for a meander line.

(*French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47; *Niles vs. Cedar Point Club*, 175 U. S., 300, 308; *Russell vs. Maxwell Land Grant Co.*, 158 U. S., 253, 259; *Cavazos vs. Trevino*, 73 U. S., 773; *Jones vs. Johnston*, 18 How., 150; *Johnston vs. Jones*, 66 U. S., 209, 217; *Menasha Wooden Ware Co. vs. Lawson*, 70 Wis., 600; *Shoemaker vs. Hatch*, 13 Nev., 261, 266; *Fuller vs. Shedd*, 161 Ill., 462; *Lammers vs. Nissen*, 4 Neb., 245; *Schlosser vs. Hemphill*, 90 N. W. Rep., (Ia.) 842; *Barnhart vs. Ehrhart*, 33 Or., 274; *Granger vs. Swart*, 10 Fed. Cas., 961).

In *French-Glenn Livestock Co. vs. Springer, supra,* plaintiff, as owner of certain fractional lots,, shown on the plat of the government survey thereof as abutting upon the meander line of Malheur lake, brought the action to eject defendant from possession of a tract of about 160 acres lying between the meander line and said lake, and claimed by plaintiff to be a part of his fractional lots. As stated by *Mr. Justice Shiras* (page 50),

> "The contention of the plaintiff in error was in the courts below, and now is in this court, that, as the plaintiff in error bought in reliance upon the plats and patents which showed the meander line of the lake, such plats and patents must be deemed to conclusively establish that the lake was the northern boundary of the land so far as the rights of the riparian grantees were concerned."

The defense was: That, at the time of the survey, there was no lake in front of said lots; that Malheur lake is, and at the time of the survey was, a well defined lake lying northeasterly from the lots; that the lake never extended to the supposed meander line, and that there had never been any recession of the waters so as to constitute the land in controversy reliction.

The positions of the respective parties were precisely similar to those of the parties here.

The trial court held that these were questions of fact which were not concluded by the patent, and this position was affirmed by the Supreme Court of Oregon, and in turn by this court, which said (page 51):

"As this question was submitted to the jury and found against the plaintiff in error, such finding conclusively determines *the controversy*. * * * We agree with the Supreme Court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake, thus laid bare, to accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. * * * The jury having found that the facts under this issue were as claimed by defendant in error, the conclusion must be that the rights of the plaintiff must be regarded as existing within the actual lines and distances laid down in the survey, and to the extent of the acreage called for in the patents, and that the meander line was intended to be the boundary line of the fractional section."

In other words, there is no estoppel in these cases to show the truth and to demonstrate that Cedar Island lake does not now approach, and has never approached, the meander line shown upon the plat as the boundary of the fractional lots in question.

It follows, as a logical and necessary conclusion from the foregoing premises that

POINT III.

THE MEANDER LINE SHOWN BY THE PLAT CONSTITUTED THE INTERIOR BOUNDARY OF THE GOVERNMENT LOTS OWNED BY THE PLAINTIFF IN ERROR.

This proposition is supported by all the authorities, and rests upon the following reasons:

1. Plaintiff is the undisputed owner of the full quantity of land demanded by its patents, and none of the defendants is in possession of any part thereof.

2. Such land conforms to the description thereof in the patents, and there is no occasion for the extension thereof by construction.

3. The pretended survey was palpably fraudulent and did not conclude the government, and plaintiff in error and its predecessors in title were bound to take notice of the fact.

4. The land occupied by defendants in error has never been surveyed, either actually or theoretically, and, therefore, was not subject to patent.

5. The "natural monument" demanded by plaintiff in error did not exist as respects its fractional lots, and was a false call.

6. There was no intention to convey by the patents under which plaintiff in error claims more or other than the land shown upon the plat, either in respect of area or contour.

7. The meander line marked the termination of the survey in section 4.

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1. PLAINTIFF IS THE UNDISPUTED OWNER OF THE FULL QUANTITY OF LAND DEMANDED BY ITS PATENTS, AND NONE OF THE DEFENDANTS IS IN POSSESSION OF ANY PART THEREOF.

2. SUCH LAND CONFORMS TO THE DESCRIPTION THEREOF IN THE PATENTS, AND THERE IS NO OCCASION FOR THE EXTENSION THEREOF BY CONSTRUCTION.

These propositions are expressly found as facts by the court (record, par. 9, 11, pp. 58, 59; par. II, p. 61).

3. PLAINTIFF IN ERROR AND ITS PREDECESSORS IN TITLE WERE BOUND TO TAKE NOTICE THAT THE PRETENDED SURVEY WAS FRAUDULENT AND DID NOT CONCLUDE THE GOVERNMENT.

The references to the record and the language from the authorities, cited under point II of this brief, show the fictitious nature of the survey and its inconclusive effect upon the government, and need not be repeated here.

It needs no argument to support the assertion that the plaintiff in error and its predecessors in title were bound to take notice thereof, for the principle is commonly recognized that every purchaser of land is charged with knowledge of all documents and records through which his title is derived (16 *Am. & Eng. Enc. of Law, 1st ed.*, 798; 23 *id., 2nd ed.*, 508, and citations in notes; *Ames vs. Lowry*, 30 Minn., 283; *Briggs vs. Ripley*, 37 Minn., 78; *Cannon vs. Emmons*, 44 Minn., 298; *Pinney vs. Russell*, 52 Minn., 443). Including the records of the General Land Office (*Ware vs. Easton*, 46 Minn., 181; *Coursolle vs. Weyerhaeuser*, 69 Minn., 335.)

The further rule is equally recognized that surveys of public lands are "conclusive and binding upon all persons having to deal with the United States, as well as upon the government itself" (*Mann vs. Tacoma Land Co.*, 44 Fed. Rep., 27, 29; *Niles vs. Cedar Point Club*, 85 Fed Rep., 45, 52; *Niles vs. Cedar Point Club*, 175 U. S., 300, 306, 308; *Bates vs. Illinois Central R. R. Co.*, 66 U. S., 204; *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, 51).

There is no basis, consequently, for the assertion by plaintiff in error of any estoppel as against the government—under which defendants in error must derive their title when the lands are surveyed.

4. THE LANDS OCCUPIED BY THE DEFENDANTS IN ERROR HAVE NEVER BEEN SURVEYED AND HAVE NEVER BEEN SUBJECT TO PATENT.

The regulations governing surveys and the disposition of public lands, as disclosed by sections 2275, 2355, 2395, 2396, 2397, 2403, *et al.* of the Revised Statutes of the United States, and by Act of May 14, 1880, Sec. 3, and other statutes, require that all public lands must be surveyed before they can be granted by the government. It is not open to question that a patent conveys only land which is surveyed. (*McIver's Lessee vs. Walker*, 9 Cranch, 173, 178; *West vs. Cochran*, 17 How., 403, 407; *United States vs. Pacheco*, 22 How., 225, 226; *Buxton vs. Thayer*, 130 U. S., 232; *Niles vs. Cedar Point Club*, 85 Fed. (C. C. A.), 45, 52; *same case affirmed*, 175 U. S., 300, 306; *Horne vs. Smith*, 159 U. S., 40, 44-5; *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, 52; *Lammers vs. Nissen*, 4 Neb., 245; *Boynton vs. Miller*, 22 Ia., 579; *Glenn vs. Jeffrey*, 75 Ia., 20; *Grant vs. Hemphill*, 92 Ia., 218; *Schlosser vs. Hemphill*, 90 N. W. (Ia.), 842, 843; *opinion of Mr. Justice White in Kean vs. Calumet Canal & Improvement Co.*, 190 U. S., 498.)

The fact that the lands in suit have never been surveyed is explicitly found (record, p. 57, par. 4; p. 81), is not disputed by the plaintiff in error, and was distinctly recognized by this court in *Kirwan vs. Murphy*, 189 U. S., 35, 52. Hence, if we assume that, by the issuance of its patents according to the plat of the pretended Howe survey, the Government has adopted it to that extent, the

1160

scope of the grant to the predecessors in title of plaintiff in error will be discovered by ascertaining the limitation of the survey so adopted. Turning our attention to that inquiry, we find that:

5. THE "NATURAL MONUMENT" DEMANDED BY PLAINTIFF IN ERROR DID NOT EXIST AS RESPECTS THE FRACTIONAL LOTS OF PLAINTIFF IN ERROR AND WAS A FALSE CALL.

This demand of the plaintiff in error is mistakenly based upon the accepted doctrine announced in *Cragin vs. Powell,* 128 U. S., 691, 696, in these words:

> "When lands are granted according to an official plat and their survey, the plat, with its notes, lines descriptions and land marks, becomes as much a part of the grant or deed by which they were conveyed, and, as far as limits are concerned, controls, as much as if such descriptive features were written out on the face of the deed or grant itself."

And because Cedar Island lake appears upon the plat in question as the boundary of the fractional lots, plaintiff in error relies, further, upon the familiar rule applied in *St. P. & P. R. R. Co. vs. Schurmeier,* 7 Wall., 272, to the effect that meander lines are not run as boundaries, but for the purpose of defining the sinuousities of the banks of streams or other water bodies, and that, in the language of this court,

> "In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the water-course, and not the meander line, as actually run on the land, is the boundary."

It will thus be seen that the contention of the plaintiff in error rests upon these two postulates:

(1) That the plat is a part of the patents; and

(2) That because Cedar Island lake is shown upon the plat as the boundary of the fractional lots, this representation becomes conclusive that the lots abut upon the lake, wherever found, for the reason that the lake constituted a natural monument which will prevail over all other calls in the survey.

All that the first factor compasses is, that, by reference to a plat, a conveyance of land transfers the property as if it had been described in detail by the courses, distances and boundaries marked upon the plat. (*Murdock vs. Chapman*, 75 Mass., 158).

It is submitted that the rule in *Cragin vs. Powell* fully supports the contention of the defendants in error, inasmuch as the government plat of township 57 indicates the exact contour and proportions of the fractional lots described in the complaint, and that they are bounded by lines of such length and character as to enclose the exact acreage called for by the patents, and which the court has found is actually possessed by the plaintiff in error (record, p. 59).

The vice in the application of the rule attempted by the plaintiff in error lies in its disregard of the facts (a) that a plat is only a pictorial delineation of the actual survey, and (b) that reference to a plat in a deed of conveyance is, in fact and in law, a reference to the *survey*, which the plat purports to represent. (*Chinoweth vs. Lessee of Haskell*, 3 Pet., 92, 96; *Heath vs. Wallace*, 138 U. S., 573, 583; *Niles vs. Cedar Point Club*, 175 U. S., 300, 306; *McClintock vs. Rogers*, 11 Ill., 279; *McCormick vs. Huse*, 73 Ill., 363, 374; *Edward vs. Tarbox*, 7 Me., 61; *Heaton vs. Hodges*, 14 Me., 66; *Williams vs. Spaulding*, 29 Me., 112; *Chan vs. Brandt*, 45 Minn., 63, 64-5; *Ferch vs. Konne*, 78 Minn., 515; *opinion of Supr. Ct. of Minnesota*, record, p. 86; *Hall vs. Davis*, 36 N. H., 569; *Steele vs. Taylor*, 3 A. K. Mar., 225; *Jackson vs. Freer*, 17 Johns., 29; *Hart vs. Evans*, 49 Tex., 311; *Turner vs. Ry. Co.*, 112 Mo., 542).

> "The map was intended to represent the relative situations and localities of the lots as regarded each other; the actual survey was the practical location; and although the patents do not specifically refer to the field-book and the actual survey of the lots, they virtually refer to them by referring to the map composed from the survey, and the lots acquired their individuality from the survey also. Without, therefore, any express reference to the field-book or survey, the reference to the map was a reference to its accompaniments, the field-book and the survey." (*Jackson vs. Freer, supra.*)

> "Where, in a patent from the United States, the land is only described by numbers and quarters, we have to look at the plat *and field-notes* of the public surveys in order to locate the land.

These are to be construed as if incorporated into the patent itself." (*McClintock vs. Rogers*, 11, Ill., 279.)

Without the field-notes the plat has no significance (*Wilson vs. Hoffman*, 54 Mich., 246); hence, the pronouncement in *Cragin vs. Powell* that, "the plat, with its *notes, lines, descriptions and land* "*marks* becomes * * * a part of the grant * * * and "*as far as limits are concerned, controls as much as if such de-* "*scriptive features were written out on the face of the deed or grant* "*itself,*" makes the field-notes a part of the grant. This is in line with the principle referred to which charges every purchaser of land with knowledge of all documents and records through which he derives title.

Moreover, as we have just seen, surveys of public lands are as conclusive upon all persons acquiring such lands, as upon the Government itself.

The doctrine that a call for a natural monument has supremacy over courses, distances and quantities named in a grant, rests solely upon the presumption that monuments are less liable to be mistaken than the other calls; if, consequently, the monument does not exist, or is itself a mistake, the presumption disappears, and the rule cannot be invoked.

It must be remembered that this presumption touching monuments is *a rule of construction only*, adopted by the courts to enable them to arrive at the true *intention* of the parties to a grant, and that when the reason for the application of the rule fails, it ceases to have force.

There are three grounds for refusing to observe the rule in these cases: *first*, because the call for the lake is admitted to be false; *second*, because the congress has adopted special and exclusive rules for the identification of lands surveyed and sold by the Government, and, consequently, for determining the intention of the parties; *third*, because the intention of the parties to the contrary is clear.

First: The Supreme Judicial Court of Massachusetts has said: "The only reason given, or which can be given, why monuments are to control the courses and distances in a deed is, that the former are less liable to mistakes. If, then, it appears that no mistake can reasonably be supposed to have been made,

no reason remains for the application of the rule." (*Davis vs. Rainsford,* 17 Mass., 207, 210.)

Given, then, the adjudged fact that Cedar Island lake is a fictitious and false call, it cannot be said to be "less liable to mistake" than the courses and distances laid down in the field-notes and based upon the township line actually run by the surveyor and plainly marked upon the ground.

"The rule that monuments prevail over course and distance *does not apply to mistaken or false calls,* as in a case like this, where the evidence conclusively shows that the surveyor was mistaken or ignorant of the location of the monuments called for and of the local geography of the * * territory in which he was locating the survey." (*King vs. Watkins,* 98 Fed. Rep., 916, 924. See, also, *Scaife vs. Land Co.,* 90 Fed. Rep., 238, 245; *Railway Co. vs. Stigeler,* 61 N. Y., 350; *Murdock vs. Chapman,* 75 Mass., 156; *New York Co. vs. Thompson,* 83 Texas, 169; *Lamprey vs. Mead,* 54 Minn., 290, 299).

"It is true that, as a general rule, monuments, natural or artificial referred to in a deed, control on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description and leave enough to identify the land and render certain what was intended to be conveyed, *it would certainly be absurd to retain the false call."* (*White vs. Luning,* 93 U. S., 514, 524).

"If there never was a lake in front of plaintiff's lots, or if one did not exist there at the time of the survey, *then there was no natural object or monument marking the boundary of said lots;* hence resort must be had to secondary evidence, viz., the courses and distances which are ascertainable from the plats and surveys, and they must prevail. The result is natural, and the land conveyed would be just what a methodical calculation would produce from the field-notes of the survey of the fractional sections and the supposed meander line." (*French-Glenn Livestock Co. vs. Springer,* 35 Or., 312, quoted and affirmed, 185 U. S., 47, 53).

In *King vs. Watkins, supra,* it appeared that the commonwealth of Virginia patented to Robert Morris a tract of land said to contain 500,000 acres. The tract was delimited by boundaries calling for various natural monuments referred to and named in the field-notes of the survey. Two corners of the tract were clearly established and marked by the surveyor upon the ground, but the other corners of the survey were not actually located by him nor were the intervening lines actually run. The plaintiff claimed to be the owner of the land patented to Morris, while the defendants claimed title under subsequent patents. By following the courses and distances given in the field-notes the tract of 500,000 acres claimed by plaintiff would be exactly enclosed; by following the calls for natural monuments, namely, certain *creeks* and *rivers* and certain trees at the mouth of a creek that was named, the tract would contain only about 111,000 acres. The defendants insisted that the natural monuments must control over courses and distances under the familiar rule, and that, as a consequence, their patents covering lands lying outside of the lines running between such monuments were valid. The two points actually established by the surveyor ("A" and "B") could be found upon the ground. With reference to the defendant's contention that monuments must control, the court said:

> "These monuments mentioned in the survey are placed by the original surveyor at locations widely different from the positions they are shown to occupy by the actual surveys in this case. *That the surveyor, Taylor, was mistaken* in the location of these calls, *or was ignorant of their true location* relative to the lines laid down on the plat accompanying his survey, is shown by the testimony of the expert surveyors, and by the papers, grant, survey, and plat in the case, when applied to the actual geography of the country. On this ground the plaintiff asked the court to instruct the jury that these mistaken or false monuments are to be disregarded, and that the boundary lines, except the lines from "A" to "B," shall be established by the courses and distances stated in the survey and grant. The contention of the defendants that the boundary lines shall be run according to the calls for these mistaken or false monuments instead of by the courses and distances, is based on the familiar principle that natural or reputed boundaries or lines of marked trees ought to be established in preference to mere course and distance."

After referring to *White vs. Luning*, 93 U. S., 514, and *Hutchinson on Land Titles*, Secs. 529, 535, holding that monuments were relied upon only because they are *less liable to mistake*, but that where the reason for the rule failed the rule would likewise fail, the court continued with the language first quoted in this subdivision of this brief, following it with this:

> "The calls for monuments relied on by defendants in the case at bar are surely *random calls*, and the rule which holds that monuments must prevail over course and distance *does not apply to such calls*. To hold differently would give the rule an extension that has not received the sanction of any court, and that cannot be sustained by the reasons given for its adoption. An attempt to locate the survey according to the defendant's contention, and in harmony with natural monuments, disregarding the given courses and distances, gives results that would only come from the gravest mistakes in the calls for natural objects. The courses and distances are shown to be right by the fact that, when platted out, they plat back exactly to the beginning point in the form shown by the original plat, and embrace the precise quantity called for."
>
> "Such errors in the location of and call for natural objects could not occur in the case of actual survey, but are such as would almost invariably result from an intent to lay down so large a tract of land by protraction in a wilderness country, in which there was no established geography, and of which the surveyor, as shown by the evidence, had no correct knowledge. 'The general rule that the intention of the parties is to be ascertained in determining the proper construction of the contract, applies with the same effect to matters of description, in deeds and other conveyances, as to covenants and condition therein.' *Hutch. Land Titles*, Sec. 527. That it was the intention of the commonwealth to grant 500,000 acres of land to Robert Morris, and of Robert Morris to accept title to that quantity, cannot be questioned by the documentary evidence, such as the plat, survey and grant. That this intention would be defeated by adopting the construction contended for by the defendants does not admit of discussion. For the reason stated, the monuments on which the defendants must rely to establish their theory of the true boundary of the survey in controversy must be disregarded, and the boundaries must be ascertained by courses and distances."

The facts and reasoning of the case just cited are exactly in point under the contention of the plaintiff in error here that Cedar Island

lake is a natural monument which must be given supremacy over every other call of the plat or field-notes. It is insisted that the paramount influence of this call for a natural monument is due to the purpose of the surveyor to bound the fractional lots upon Cedar Island lake, but, as we have just seen where the surveyor is *mistaken* as to the location of the natural monument, and has based his survey thereon in ignorance of its true situation, the rule giving priority to the natural monument is instantly discarded, because it cannot apply to a mistaken or false call. Such reference to a natural monuments constitutes merely a *random call*, as to which the rule invoked by the plaintiff in error never applies.

In *New York Land Co. vs. Thompson*, 83 Tex., 169, the land company asserted title to certain lands under a location thereof which it claimed to have made prior to the location of Thompson. The state of Texas had issued to the International & Northern Railroad Company a large number of land certificates, some of which having been transferred to the land company it caused them to be located and surveyed on land situated upon and near Devil's river. It was the surveyor's intention, and the direction of the land company, to place the surveys on Devil's river, and the surveyor (one Kuechler) supposed that he had so located the surveys and run out the survey of the land. As a matter of fact, he made no actual survey on the ground, but from certain corners which he actually established on the ground he plotted out the survey and made calls in the field-notes for Devil's river. He was mistaken as to the true course of the river. It made a considerable bend from a point near the place where he established the southwest corner of the survey, and ran two or three miles to the east of where he supposed it was, when it deflected and again ran to the south in the course assumed by the surveyor. Upon the discovery of the error in the survey returned by Kuechler, Thompson, who held land certificates of the state which he was entitled to locate upon any unsurveyed lands, caused them to be located upon lands abutting upon Devil's river, where it made the detour referred to, which lands were supposed to have been included in the survey made for the land company. Unless the calls for course and distance should be disregarded and the calls for Devil's river observed, a small portion only of the original locations would be upon any part of the land in controversy. Thompson having brought his action against the land

company to try the title, the case resulted in a judgment in his favor, from which the land company appealed. The Supreme Court affirming the judgment said:

> "There are but two controlling questions in this case: (1) whether the calls for Devil's river, made in the original surveys of Kuechler, should be extended so as to cross the river, or should yield to course and distance; (2) [a question not material here].
>
> "If it should be ascertained that the calls for Devil's river in the field-notes of the original surveys should control, then the most of the land in controversy would apparently be covered by the original location. * * * Kuechler intended to place the surveys on Devil's river, but in his attempt to do so he evidently mistook the true course of the river.
>
> "It is true that the remaining surveys were not run out upon the ground, but were plotted in on his map. They were plotted in, however, from initial points fixed and clearly defined upon the ground. Kuechler may have intended to appropriate the land up to and across the river, but, as he did not know where the river actually was, *no random call therefor will control course and distance where there is a clearly defined starting point.* It would be utterly at variance with all the rules upon the subject so to hold. *These surveys must be run out and plotted in accordance with the field-notes,* the call for Devil's river yielding to the calls for course and distance. *Sanborn vs. Gunter* (Tex. Sup.), 17 S. W. Rep., 120, 121. And the attempt or intent to locate them upon the river would not be an equitable appropriation of the land. They are west of the portion of the land in controversy across the river from it, and, if run out in accordance with calls for course and distance, would include no part thereof."

It is obvious that, if Cedar Island lake had no actual existence at all outside of the imagination of the deputy surveyor, and the entire township were land of the character of that in controversy, the plaintiff in error would be required to relinquish wholly the claim which it now asserts. The reason for such relinquishment of its claim would be simply that the call, in the survey, for a lake, no lake existing in the township, was a *false call* which, by reason of its non-existence, must be wholly disregarded, and the extent of the grant to the plaintiff in error would be determined by other calls of the field-notes. This obvious truth demonstrates the correctness of the contention presented by the defendants in error,

1161

because the fact is distinctly found that there was no lake in the township where plaintiff in error was entitled to seek for it, and, as far as the plaintiff in error is concerned, the lake is non-existent. The call for the lake was not only erroneous but *fraudulent*, and the government is in no manner compromised by the fraud of the deputy surveyor, and its grants under his pretended survey are effectual only as to the land actually described and paid for.

These positions have been thoroughly considered and approved by this court (*Bates vs. Illinois Central R. R. Co.*, 66 U. S. 204; *Horne vs. Smith*, 159 U. S., 40; *Niles vs. Cedar Point Club*, 175 U. S., 300; *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47; *Kirwan vs. Murphy*, 189 U. S., 35), and have received without dissent the approval of all other courts in which they have been presented for adjudication. (See point III of this brief, subdiv. 7, *post.*)

The "absurdity" contended for by plaintiff in error is made more manifest in the suits here when, as the fact has been established (record, pp. 59, 60), the lake is a monument impossible to be reached. (*Bissell vs. Fletcher*, 19 Neb., 745.) If the plaintiff in error or the patentees, its predecessors in title, may be said to have been notified by the plat that they would find a lake at the interior boundary of their lots, they certainly were not authorized to believe that they could seek it elsewhere. When, therefore, they did not find such water boundary at the place designated, they were, *ipso facto*, advised that the plat had given them a false monument, and "the rights of the plaintiff in error must be regarded as existing "within the actual lines and distances laid down in the survey, and "to the extent of the acreage called for in the patents." (*French-Glenn Livestock Co. vs. Springer*, 185 U. S., 52; *Boardman vs. Lessees, etc.*, 6 Pet., 328, 345; see, also, *United States vs. Pacheco*, 17 How., 225; *McEwen vs. Den*, 65 U. S., 242; *King vs. Watkins*, 98 Fed., 913, 924; *New York Co. vs. Thompson*, 83 Tex., 169.)

Second: In pursuance of the constitutional authority (U. S. Cons., Art. IV, Sec. 3, par. 2), Congress has enacted exclusive rules for the construction of grants, and the identification of lands conveyed by the Government (U. S. Rev. Stat., Secs. 2395, 2396).

This system of public surveys was early adopted by the congress

as the sole method of surveying and disposing of government lands. Being purely statutory, grants of public lands must be scrutinized and construed by the courts with reference to the statutes, and the statutes must be given their true interpretation and force. (*McClintock vs. Rogers,* 11 Ill., 279, 295; *Chan vs. Brandt,* 45 Minn., 93, 96).

Express provisions of the statute must prevail over rules adopted and applied by courts with reference to the construction of descriptions which are not based upon government surveys, where such rules are at variance with the statutory directions.

The marked feature of this system is that the statute gives supremacy to *artificial* monuments and lines as returned by the surveyor.

Section 2395, after providing for certain methods to be observed in making surveys, by subdivision 8th requires:

That surveyors' field-books shall be *returned to* the surveyor general, who shall cause therefrom a description of the whole lands surveyed to be made up and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of townships, and fractional parts of townships, contained in the lands surveyed, *describing the subdivision thereof* and the marks of the corners.

Section 2396 prescribes:

"First. All the corners marked in the surveys, *returned* by the surveyor general, shall be *established* as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from those two corners which stand on the same line.

Second. The boundary lines actually run and marked in the surveys returned by the surveyor general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east

and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the surveyor general, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter-sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or one-fourth part, respectively, of the returned contents of the section of which they make a part."

If we analyze the statute, we find, as far as is here material:

1. That all the corners *marked* in the surveys *returned by the surveyor general* shall be *established* as the corners of sections and subdivisions of sections. Such *corners,* therefore, are not to be controlled by any natural monuments.

2. That if the surveyor general has *not* "marked" the half and quarter section corners, they shall be placed, as nearly as possible, equidistant from those two corners which stand on the same line.

3. That the boundary lines actually run *and marked in the survey returned by the surveyor general* shall be "established" as the proper boundary lines of the sections *or subdivisions.* (*Goltermann vs. Shiermeyer,* 111 Mo., 404; *James vs. Howell,* 41 Ohio St., 696).

4. That, where such boundary lines have not been actually run and marked, they shall be ascertained by running straight lines from the established corners to the opposite corresponding corners, if the subdivision be not fractional.

5. That, in fractional subdivisions, where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from a corner duly established, *due north and south or east and west lines,* as the case may be, *to the water-course,* Indian boundary, *or other external boundary* of such fractional subdivision.

> If there be no water-course or Indian boundary at the point indicated as making the subdivision fractional, the "other external boundary" of the statute *"may be forest or prairie, land or water, government or Indian reservation."* And, *if it be land,* the rights of the patentee do not extend over the meander line. (*Niles vs. Cedar Point Club,* 175 U. S., 300, 308.)

When no survey is made in the field, the lines of the chamber-survey of the surveyor general become, therefore, the "established" and controlling boundaries. (*Chapman vs. Pollock*, 70 Cal., 494; *Goltermann vs. Shiermeyer, supra; James vs. Howell, supra; Beatty vs. Robertson*, 130 Ind., 589; *Doe vs. Hildreth*, 2 Ind., 274; *N. Y. Co. vs. Thompson*, 83 Tex., 169; *Chan vs. Brandt*, 45 Minn., 93.)

6. That each subdivision of a section, *the contents whereof have been returned by the surveyor general*, shall be held and considered as containing *the exact quantity expressed in the return.*

It is very evident from these careful provisions that *the design was to provide arbitrary rules*, which should affect all parties alike, and by which the boundaries of tracts of land should be definitely, and with absolute certainty, ascertained, whether to the detriment of the government or of the purchaser.

It will be observed that no reference is made to *natural* monuments nor is it expressed that they are recognized as of any force whatever. The law only provides for *artificial* monuments, that is, those made and designated by the surveyor general for the very purpose of fixing and controlling the boundaries of the survey. There is no need, under this system, to apply any rules of construction to ascertain and determine the intent of the parties. The officers of the government are conclusively presumed, in selling the public domain, to sell it in accordance with the provisions of law. The purchaser is presumed to purchase with knowledge of the law, and the only intent which he can be heard to assert is that he expected to receive that which has been, or will be, ascertained to be his due upon strict compliance with the law. The law enters into his contract and forms a part of it.

Taking sections 2395 and 2396 together, it is obvious that the plat is intended to serve the purpose of representing in map form the result of the survey, but the length and location of the lines of the various subdivisions are to be ascertained solely from the lines as marked in the survey returned as actually run and established by the surveyor. Hence, of necessity, a purchaser of public lands is remanded always to the marks on the ground, if discoverable, or, in their absence, to the survey returned, to ascertain the exact boundaries of any tract purchased by him (*Goltermann vs. Schiermeyer,*

111 Mo., 404), and particularly would this be true where the most superficial view of the premises would indicate the absence of established lines upon the ground. Hence, there was imposed upon the patentees of the government lots now owned by plaintiff, the duty of ascertaining from the field-notes of surveyor Howe the boundaries of those lots, when it became apparent—as it would instantly—that Cedar Island lake could not, by any possibility, bound the lots in question. (*Whitney vs. Detroit Lumber Co.*, 78 Wis. 240; *McCormick vs. Huse*, 73 Ill., 363, 373-4).

Now, the meander line, with every station and variation, as established by the survey, is exactly described in the field-notes, and shown upon the plat, so as to delimit with precision each of plaintiff's lots. When so delimited, it is shown by mathematical calculation that the lots contain the exact areas recited in the patents therefor.

Hence, we are given two sets of absolute data from which plaintiff's lands and the intent of the parties can be ascertained: *first*, the exterior corners marked upon the ground, and, *second*, the established meander line of the lake, both incontestable. (*French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, 54).

It is merely a matter of measurement, running the lines from the corners established on the exterior of the section to the water-line *as actually run and established by the surveyor and approved and adopted by the government.* (*Chan vs. Brandt*, 45 Minn., 93).

The water-line so established is as conclusive as any other line. *The government has the option to declare and fix what* SHALL BE DEEMED *the water-line for the purpose of a survey and sale of public lands.* (*Bates vs. Ry. Co.*, 66 U. S., 204, 208; *Niles vs. Cedar Point Club*, 175 U. S., 300, 307; 85 Fed., 45; *Horne vs. Smith*, 159 U. S., 40, 45).

The Bates case cited is the forerunner of *Horne vs. Smith* and *Niles vs. Cedar Point Club*, in recognizing that so-called meander lines may be boundaries.

In that case, a survey was made of land represented to be bounded on the south by the Chicago river running due east into Lake Michigan. In fact, the river, before emptying into the lake, turned abruptly south and reached the lake at a different point, leaving a long spit of land between the river and the lake. The survey showed the river running directly into the lake, omitting the turn toward the south. Plaintiff, claiming under patent for the

lot bounded southerly by the river as thus shown, sued in ejectment for the spit of land mentioned. This court held: That is was immaterial where the mouth of the river was in fact, because "the "public had the option to declare the true mouth of the river, *for the "purposes of a survey and sale of the public land,"* and the meander line shown upon the plat was pronounced to be the southerly boundary of plaintiff's land.

Even if the cases at bar were taken to present an instance of a lost monument, because the "natural monument" demanded by the plaintiff in error is not found upon the ground, the rule is undoubted that it must be located from the field-notes and plats of the original survey. In so doing, resort must be had to known lines and monuments as the basis on which to run out and locate the original lines of the fractional lots. (*French-Glenn Livestock Co. vs. Springer,* 35 Or., 312; affirmed, 185, U. S., 47, 53; *Boardman vs. Lessees, etc.,* 6 Pet., 328, 345; *McEwen vs. Den,* 65 U. S., 342; *King vs. Watkins,* 98 Fed., 913, 914; *Stadin vs. Helin,* 76 Minn., 496, 501-2; *Thompson vs. Trowe,* 82 Minn., 471; *McClintock vs. Rogers,* 11 Ill., 279).

As to the *Schurmeier case* (7 Wall. 272), so strongly relied upon by plaintiff in error, we desire to point out specifically (what we have already stated generally in respect of all the authorities cited by plaintiff in error) that the case involved purely and simply a rule of *riparian rights.* There, a meander line was actually run along the Mississippi river, and the subdivisional lines of the section ran to the river. The land in dispute was a sand-bar lying in the stream, and, briefly stated, the controversy was whether a fractional government lot, *confessedly bounded by a river,* stopped at the water's edge, or extended to the navigable waters of the stream, so as to include the sandy island or bar referred to. The fact that plaintiff was a riparian owner was conceded, and only the extent of his riparian privileges and estate was in dispute. The contention was made that the meander posts on the bank marked the boundary of the patented lands, but the court held otherwise, in the familiar language relied upon by plaintiff in error.

The rule of that case was correct as applied to the facts of that

case; but it can have no application or force when invoked—as it is by the plaintiff in error—with reference to an entirely different state of facts presenting no question of riparian rights.

This distinction is explicitly recognized and pointed out in *Grant vs. Hemphill*, 92 Ia., 218, where the facts cannot be distinguished from those in the case at bar, and where the same contention was presented by the plaintiff as is relied upon by the plaintiff in error in these cases. It was also recognized, and the scope of the decision carefully defined, in *Shively vs. Bowlby*, 152 U. S., 1, 38-9. See, also, *opinion of Supreme Court of Minnesota* (record, p. 84); *Shoemaker vs. Hatch*, 13 Nev., 261, 266; *James vs. Howell*, 41 Ohio St., 696.

In addition to the *Schurmeier case*, the cases of *Hardin vs. Jordan*, 140 U. S., 384, and *Mitchell vs. Smale*, 140 U. S., 406, are chiefly relied upon by plaintiff in error, and are said by its counsel to be sufficiently conclusive as to preclude the necessity for other discussion.

These cases are so well known as to demand little comment, and we will content ourselves by saying that, in the former, the questions to be decided were, (a) What law determines the rights of *riparian owners* in the bed of a *non-navigable* but *meandered* lake from which the water has disappeared?; and (b) If the state law, what is that law?

It was held that the law of the state where the property is situated controls, and that the common law prevails in Illinois. As to the issue in that case, *Mr. Justice Bradley* said:

> "The controversy here is between *the riparian owner* and a party claiming the land under water in front of him."

In the *Mitchell* case (which concerned the same lake and survey, and which was tried and decided at the same time as *Hardin vs. Jordan*), the controversy was over a jut of land extending out into the lake from a fractional lot confessedly abutting upon the water.

In those cases (and in all the cases cited in behalf of the plaintiff in error) it was conceded that the meander lines had been actually run along the margin of water existing where shown on the plat, and that the water was the boundary of the patented lands. (See opinion of Supreme Court of Minnesota, record, p. 85).

In the cases at bar, it is conceded that the meander line was never run at all, and that Cedar Island lake did not exist within an approximate distance of a mile from the location shown on the plat.

In each of the two cases last referred to, *Mr. Justice Bradley* guarded the application and scope of the decisions by saying, in the first:

> "There should be some extraordinary proof of mistake on the part of the surveyor, in order to interfere with the passing of the land as riparian land."

In the second case he said:

> "Cases have happened in which, by some mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water-line intended to be portrayed. *Such mistakes, of course, do not bind the Government.*"

Here, instead of *mistake* it is found that there was *deliberate fraud,* and, as a result, the effect of the pretended meander line to extend the grants to the actual body of water, wherever found, was destroyed.

The argument for the defendants in error might well be rested here. If it be true that the fact of Cedar Island lake appearing upon the plat as the boundary of the fractional lots, is not controlling, in case it is a false call, then the plaintiff in error has no support for these suits, inasmuch as they rest, in the last analysis, upon the single proposition that *the plat shows a water boundary upon that lake.* It has been found as a fact that the call of the plat is false, and this court has held that, in such case, the call must be rejected. Consequently, the cases for the plaintiff in error have nothing upon which to stand.

Nevertheless, we will consider the third ground (*ante., p.* 21) for refusing to observe the rule of the *Schurmeier case,* namely, that the intention of the parties to the original grant to the contrary is clear under every rule of construction.

6. THE GOVERNMENT STANDS IN THE POSITION OF ANY OTHER PROPRIETOR AS RESPECTS THE CONSTRUCTION OF ITS GRANTS, AND THERE WAS NO INTENTION TO CONVEY MORE OR OTHER THAN THE LAND SHOWN UPON THE PLAT, EITHER IN RESPECT OF CONTOUR OR AREA.

By an elementary rule, in the construction of a deed, effect is to be given to the intent of the parties. Intent is variously disclosed.

(a) It is not to be disputed that the United States, as an incident of sovereignty, can contract like any other grantor. That it can bound its grants by whatever limits it may fix is, therefore, an indisputable proposition. Having the right to determine when and how the public domain shall be surveyed, it has power to establish a line in the midst of a prairie, or forest, and to issue patents for the lots bounded by such lines. Hence, it could restrict the grant of the fractional lots in section 4 to the meander line shown upon the plat as a boundary. (*Niles vs. Cedar Point Club,* 175 U. S., 300, 308). The presumption, then, ordinarily is, that it was the intention to terminate the survey at the point indicated upon the plat. Undoubtedly, if at such point a body of water exist, it will become the boundary, but, if none be there, the line so laid down must mark the boundary of the survey, otherwise, there is no such thing as an "established" line.

In these cases, it is conceded that there was no actual survey, and that the interior boundary of the fractional lots was established by the surveyor arbitrarily, and without reference to any actually existing object. The presumption, then, becomes conclusive that the intention was to convey nothing beyond the meander line shown upon the plat (*Niles vs. Cedar Point Club, supra,* p. 306).

(b) An important element to be considered in discovering the true intent of the parties to a grant is the *distances* named in the description.

The field-notes show explicitly the course and length of every varying line bounding the fractional lots. It would be quite valueless to introduce excerpts from them here, but the particular descriptions of importance will be found at pages 32, 35 and 36 of the record.

According to the field-notes, and the plat as well, the distance from the northeast corner of section 4 (which was actually marked upon the ground by the surveyor) to the meander line, is 26 chains and 10 links; the distance from the southwest corner of the section to the meander line is 12 chains and 10 links; the survey gives exact courses and distances for the meander line connecting these points.

Exhibit "B" (record, p. 82) indicates that the distance from the section line to the actual lake varies from three-quarters of a mile to a mile and a quarter.

The case of *Horne vs. Smith*, 159 U. S., 40, determines the conclusive effect of these facts. That was ejectment by plaintiff to recover certain lands in possession of the defendant. Plaintiff's title rested on a patent conveying lot 7, section 23, and lots 1 and 2, of section 26, containing "170 acres, according to the official plat of the survey of said lands returned to the general land office by the surveyor general." The lands in question were bounded on the west by a meander line noted on the plat as defining Indian river. The length of the lot lines from the east boundary to the meander line was shown to be 30 chains. As a matter of fact, the meander line shown on the plat delimited a bayou connecting with Indian river between which and the river was a tract occupied by defendant, containing about 600 acres of upland extending in width, in some places, a mile and a quarter, and covered with live oak trees of large diameter. This land was not formed by accretion after the making of the survey.

In an opinion holding that the plaintiff could not recover, *Mr. Justice Brewer* said:

> "The contention of the plaintiff is, that, inasmuch as this body of land is not shown upon the official plat, and, although the boundaries and areas of the three lots are given, the latter aggregating only 170 acres, the patent of the lots conveys all the land to the main body of the river; in other words, a patent for 170 acres conveys over 700. The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land not simply to the meander line, but to the water line."

The court below charged the jury that the patent had reference to the field-notes and map of the survey; that a meander line ordi-

narily is not a boundary, but that the water represented is the true line; that, nevertheless, the rule has its limitations, as in cases where long distances intervene between the meander line and the water-line; and that the case in question fell within the exception to the rule.

> "Whatever criticisms," said *Mr. Justice Brewer*, "may be placed upon this instruction, we think that, as applied to the facts of this case, the rule of the court was substantially correct. * * * *The distance from the east line of the section to the meander line is given*, and which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half."

The decision of that case rested upon the considerations that a patent will not convey unsurveyed land, and that the Government had no *intention* of conveying 700 acres when it patented only 170. This intention was disclosed by the facts that the land in dispute lay beyond the meander line shown on the plat; that it had never been surveyed; that the river was in another section and the lots could not extend to it, and that *the plat showed the precise length of the boundaries from the section line to the meander line.*

It follows that there was no intention to include the land in dispute here in the grants made to the patentees of the fractional lots in section 4, but that those grants were limited by the distances shown in the field-notes and on the plat.

(c) In arriving at the true extent of a grant, *quantity* is an important element in determining the intention of the parties.

In interpreting a patent, the entire description must be taken and the identity of the land ascertained by a reasonable construction thereof, rejecting, if necessary, any erroneous call. (*Boardman vs. Lessees, etc.*, 6 Pet. 328, 345; *Lessee of Croghan vs. Nelson*, 3 How., 187, 194; *Case vs. Dexter*, 106 N. Y., 554; *Ry. Co. vs. Stigeler*, 61 N. Y., 348, 350-1; *McCormick vs. Huse*, 73 Ill., 363, 373-4; *Rioux vs. Cornier*, 75 Wis., 570; *Hostetter vs. Ry. Co.*, 108 Cal., 38.) Especially is this the case where a survey was not actually run upon the ground. (*Platt vs. Vermillion*, 99 Fed. Rep. (C. C. A.), 356, 367).

When the starting point is beyond dispute (as in the cases at bar),

and the definite metes and bounds of the survey close, there can ordinarily be no doubt of the location of the tract; but when, in addition, the area embraced within such boundaries is the precise quantity specified in the conveyance, the demonstration is conclusive as to the intention of the parties respecting the location of the disputed line. (*King vs. Watkins*, 98 Fed. Rep., 913, 924; *McCormick vs. Huse, supra; Hostetter vs. Ry. Co., supra*).

No actual survey having been made in these cases, there is no room for any presumption of intent on the part of the Government beyond the purpose to grant to the patentee the quantity paid for and recited in the patent; on the contrary, the presumption of an intention to convey only the quantity of land named in the patents becomes conclusive. Fractional lots 3, 5, 6 and 7 were sold and paid for as containing an aggregate area of 141.37 acres. These lots, except lot 3, which is platted as containing 50.87 acres, were fractional *forties*, and were so noted upon the plat. The statute requires public lands to be subdivided by the surveyor into full forty-acre tracts, if possible (U. S. Rev. Stat. § 2397). The patentees knew that they were buying less than forty acres in these tracts, and did not intend to buy more; they understood, and the Government understood, that Howe did not intend to survey enough land to make them full forties. If extended so as to comprise the land claimed in these suits, the four lots would embrace 359.56 acres; in like manner, all the fractional lots surrounding Cedar Island lake, with an aggregate area of only 595.76 acres, would, if extended, contain more than 1,500 acres.

As said by *Mr. Justice Brewer* in *Horne vs. Smith*, "the area of "the lots is given, and when that area is stated to be 170 acres, *it "is obvious* that no survey was *intended* of over 700 acres." Again, in *French-Glenn Livestock Co. vs. Springer* (185 U. S., 47), this court said, with reference to the claim of the plaintiff in error for land lying beyond its meander boundary:

> "The land in dispute in possession of the defendant in error was not included within the lines of the original survey, nor in the description of the lands contained in the patents and in the deeds of conveyance under which the plaintiff in error holds, and to add the land in controversy to the lots so described would more than double the area of the land claimed by plaintiff in error. * * * The jury having found that the

facts under this issue were as claimed by the defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded as existing within the actual lines and distances laid down in the survey, and to the extent of the *acreage* called for in the patent."

(d) Another convincing demonstration of the true intent of the Government is found in the fact that ***the United States has no title to land covered by the waters of navigable lakes,*** but such title is vested in the State within which such waters are situated, in trust for the public use. The United States has no property therein which it can convey, and the State is powerless to divest itself of the trust. (*Niles vs. Cedar Point Club,* 85 Fed. Rep., 45, 50, affirmed, 175 U. S., 300, 308; *Ill Central R. R. Co. vs. Illinois,* 141 U. S., 387, 435; *Lamprey vs. State,* 52 Minn., 181, 198; *Ill. Steel Co. vs. Bilot,* 109 Wis., 418, declaring that a title which, on the face of the plat, might appear to be conveyed, would be defeated by evidence showing that the premises in question were naturally a part of the bed of a navigable lake.)

According to the plat and field-notes, the waters of Cedar Island lake, a navigable body of water (stipulation of plaintiff in error, record, pp. 13, 14; decision, p. 57), extended to the meander line returned by Howe. It is impossible to presume an intention to convey, by reference to the plat, any land lying beneath the waters of the lake ***as shown upon the plat,*** to which the Government had no title, and which it knew (under the rule just referred to) it was powerless to convey.

(e) Again, the patents describe the land as being in section *four.* The lots, therefore, cannot go to the lake, in any event, within the express limitation of their grant. It has been shown that the interior lines of a section are "established" lines of equal potency with section lines themselves, and it was this consideration which led to the adoption of the rule declared in *Whitney vs. Detroit Lumber Co.,* 78 Wis., 240, to the effect that, if a water boundary be not found within the lines of a forty, it cannot be pursued beyond such subdivision. If there be any foundation for the claim made by the plaintiff in error, there is no more reason why the lots should terminate at the *section line* in the search for their true boundary, the

lake, than that they should stop at any quarter or eighth line. If they cannot be extended to the lake for any reason, *ipso facto*, the lake is demonstrated to be a false call, and the grant must be limited to the boundaries indicated upon the plat.

But this question is set at rest by the decision of this court in *Horne vs. Smith, supra.* In that case, as we have seen, the lots in question appeared upon the plat to be bounded by the Indian river whereas there existed between the meander line returned and the Indian river several hundred acres of high land. In discussing the matter, this court took occasion to say:

> "In the second place, the meander line as shown on the plat is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water-line of the main body of the river is a mile or a mile and a half west thereof, in sections 22 and 27. * * * Further, the description in the patents is of certain lots in sections 23 and 26, and, manifestly, that *was not intended* to include lands in sections 22 and 27."

It is clear, then, that the lines of these lots cannot be extended to reach the lake in sections 3 and 9.

To avoid this manifest obstacle, plaintiff in error urges that the lines of the fractional lots may be deflected to accommodate the lots to any water frontage that may be available. This contention is palpably fallacious. It overrides the statute requiring that all the lines in public surveys shall be straight lines running east and west and north and south, and it demonstrates that unless the meander line be the boundary, the patents must be void for uncertainty, since there is no possible legal method of determining to what point the lines must be deflected inside or outside the section.

It must be conceded:

(1) That whatever land was conveyed by the patents of the fractional lots, the title thereto vested in the patentees the instant the patents were delivered; because claims under patents cannot extend beyond the boundaries therein described (*West vs. Cochran*, 17 How., 402, 413).

Nothing has been added to the grant since that time; the patents speak as of their date.

> "The rights of the patentee were limited to the very lands which were conveyed to her." (*Niles vs. Cedar Point Club*, 175 U. S., 300, 308.)

(2) That the land so conveyed was at once susceptible of ascertainment from the terms of the patents.

> "It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself." (*Chinoweth vs. Lessees of Haskell*, 3 Pet. 92, 96; see also, *Brown vs. Huger*, 21 How., 305, 318).

(3) That the boundaries of the grant were governed by some definite rule of law controlling in all cases presenting facts calling for its application (*McEwen vs. Den*, 65 U. S., 242, 247).

If such boundaries were not fixed by the patents, the grants were void for uncertainty. (*Buyck vs. United States*, 15 Pet., 215, 224-5; *Muse vs. Arlington Hotel Co.*, 68 Fed. Rep., 637, 643-4; *Boardman vs. Lessees, etc.*, 6 Pet., 328).

There is no merit in the suggestion of the plaintiff in error that the patentees or their successors in interest must determine between themselves their respective boundaries.

Whenever the question in any court, state or federal, is whether the title to land which has once been the property of the United States has passed, that question must be resolved by the laws of the United States (*Wilcox vs. Jackson*, 13 Pet., 498, 517). What are those laws was answered by this court in the recent case of *Kirwan vs. Murphy*, 189 U. S., 35, as follows:

> "Sections 2395, 2396 and 2397 of the Revised Statutes, specify the manner of making surveys of public lands, and prescribe the rules by which the *form* and *boundaries* of the tracts are determined."

See, also, *Niles vs. Cedar Point Club*, 175 U. S., 307.

If, then, the patentees acquired from the United States only the land comprised within the meander line indicated on the plat, the plaintiff in error can claim no greater rights or estate. A purchaser of property takes only such title as his seller has and is authorized to transfer. *Nemo dat quod non habet.* He acquires precisely the interest which the seller owns, and no other or greater. *Nemo plus*

juris ad alium transferre potest quam ipse habet (*Barnard vs. Campbell*, 55 N. Y., 456, 461; *Russell vs. Maxwell Land Grant Co.*, 158 U. S., 253, 259).

Hence, the question of title in plaintiff in error is referred back to the actual title acquired by the patentees.

Now, what did the patentees take, and how could they determine their boundaries?

If the fractional lots extended to the lake at the time the patents were issued, they were projected, either in straight lines or by deflected lines. We have seen that public surveys are absolutely the creatures of the statute. The lots in question are *fractional.* What is the statute?

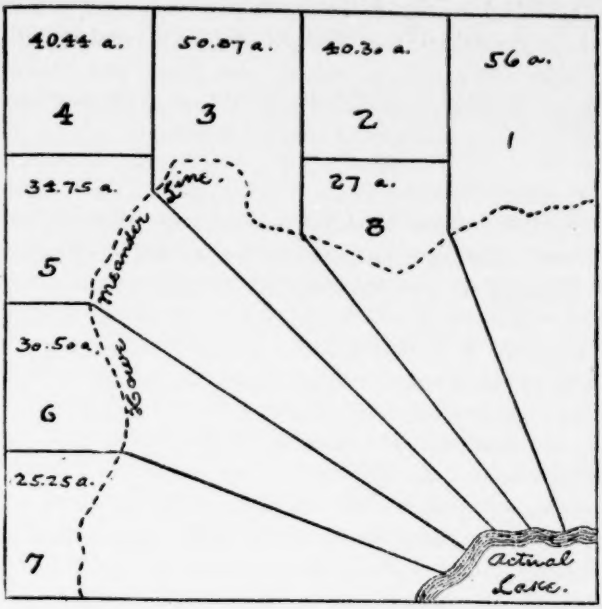
Where the sections are fractional, "boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course," etc. (U. S. Rev. Stat. §2396). Hence, no line in a government survey can ever be deflected or run in any direction except north and south or east and west. Moreover, in the absence of statute, grants are assumed to be in rectangular form. (*Massie vs. Watts*, 6 *Cranch*, 148, 165; *Ferguson vs. Bloom*, 144 Pa. St., 565).

The moment any rectilineal extension of any one of the lots in question is attempted, there is instant and irreconcilable interference with the extension of every other lot (record, p. 60).

The patentees, therefore, acquired nothing by an extension of their lots beyond the meander line in straight lines.

If the lots extend beyond the meander line, at all, then, it must be along deflected lines, as suggested by plaintiff in error. It is clear that the only mode in which the lot lines can be deflected so as to give all of the lots a frontage upon the lake, is by concentrating them upon the small 20 acre portion of the lake in the southeast corner of the section.

According to the method of converging lines, the patents for the various fractional lots conveyed, *at the moment of their delivery and by their own terms,* tracts substantially as indicated by the following sketch:



Can it be seriously contended for a moment that, in issuing its patents, there was any *intent* on the part of the Government to convey, or any expectation on the part of the patentees to receive, any such bodies of land as are indicated by the foregoing sketch? *If so, what becomes of plaintiff's reliance upon the plat?* Does the plat convey any intimation that a purchaser of the fractional lots in section 4 would acquire such extraordinary tracts? Does the survey which the plat depicts evidence an intention to make such a division of the land?

This inquiry, too, has been fully answered by this court.

"If there never was such a lake—no water forming an actual and visible boundary—*on* the north end of the lots, it would seem unreasonable, either *to prolong the side lines of the survey indefinitely until the lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake.*" (*French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, 53).

The plaintiff in error, therefore, is not claiming according to the plat, but is asking the court to assign to it land not indicated by the

survey as belonging to its lots, and to do what the court has no power or jurisdiction to do, namely, to make or correct a government survey. (*Cragin vs. Powell,* 128 U. S., 691, 697, et seq.; *Kirwan vs. Murphy,* 189 U. S., 35; *Chan. vs. Brandt,* 45 Minn., 93, 94).

(f) The presumption is that all grants are made with reference to an *actual view* by the parties of the premises conveyed. The reason for holding a natural monument superior to courses and distances is that, being visible and distinct on the ground, it is presumably in the minds of the parties and is probably intended to be controlling (*Moran vs. Lezotte,* 54 Mich., 90). From this has arisen the legal presumption referred to.

In consequence, the presumption of any *intent* to bound the fractional lots by Cedar Island lake is instantly dissipated, for an actual view would show that the lake had no existence where the meander line was laid down on the plat. Instead, dense forest existed, and informed the parties that the meander line did not mark a body of water, but simply the limits of the survey. The presumption, therefore, is, that the Government, as well as the patentees, had actual knowledge of the location and character of the premises. *Then the question is presented, whether the Government, being possessed of such knowledge, intended to convey more land than the number of acres recited in the patent.*

Where there is no evidence that any other line than that described in the survey was known or imagined at the time of the entry of the lands, the parties will be presumed to have meant the grant to be bounded by the line described (*Heywood vs. Lumber Co.,* 70 N. H. 24).

Certainly it cannot be presumed that the patentees, having viewed the premises, supposed that the Government intended to include in a conveyance any other tract or any greater quantity of land than was described.

> "If there was no lake to meander, the purchaser could not have bought upon the representation that there was, and cannot become a riparian owner, and therefore can claim none of the rights appurtenant thereto." (*French-Glenn Livestock Co. vs. Springer,* 35 Or., 312).

Obviously, therefore, the intention of the parties to the patents, as gathered from the application of the accepted canons of construction, was, as in the ordinary instances of conveyance by reference to a plat, to grant the fractional lots of the township and area specified, and lying within the lines laid down, upon the plat.

7. THE MEANDER LINE RETURNED BY THE DEPUTY SURVEYOR AND DRAWN UPON THE PLAT, MARKED THE TERMINATION OF THE SURVEY, AND IS THE BOUNDARY LINE OF THE LAND OF THE PLAINTIFF IN ERROR.

We have seen that there is no controversy in these suits over any boundary except that indicated on the plat as the meander line; that the purported field notes of the survey of this township were made and returned by Howe, the deputy surveyor, without personal knowledge or inspection of the interior of the township, and that they were fictitious and fraudulent; that the meander line described in the field-notes was established by Howe arbitrarily and without reference to the actual water-line of Cedar Island lake, and did not approach the lake within a distance varying from one-half of a mile to a mile; that no survey of the lands in the township has ever been made; that a patent will not convey unsurveyed land; that Cedar Island lake is a confessedly false call, which must be rejected in determining the extent of the grant under which plaintiff in error claims, and, as a result, it must be run out in accordance with the field notes, and that the courses and distances of the survey exactly close and embrace the full quantity of land called for by the patents.

This court has already passed upon certain phases of this controversy (*Kirwan vs. Murphy*, 189 U. S., 35, 52, 54). It has recognized that *"no survey was in fact made, no meander line "was in fact run, and no body of water in fact existed near the false "meander line indicated;"* and has declared that "the administration "of the public lands is vested in the Land Department, *and its power "in that regard cannot be divested by the fraudulent action of a "subordinate officer outside of his authority and in violation of the "statute."*

Except, therefore, to the extent that the Land Department has conveyed land and received pay for it in accordance with the fraudu-

lent survey, the Government still retains title to the lands in the township.

In *James vs. Howell*, 41 O. St., 696, it appeared that certain lands in the vicinity of Lake Erie were surveyed, and a meander line run making certain fractional sections. The meander line delimited a marsh bordering upon the lake, and, at the edge of the marsh, and between it and the lake, were certain sandy ridges designated upon the plat as islands. Under patents issued in 1844 for the fractional sections plaintiff claimed the ownership of that portion of the islands which lay within those fractions if extended to the full section limits, which the surveyor had indicated upon the plat by dotted lines. In 1876, the defendant applied for and obtained a patent covering the islands referred to. The Supreme Court, sustaining the defendant's title, held:

First. Although the patents read "according to the surveyor general's plats," they must be so construed as to give effect to their true intent and meaning. But the common rule favoring the grantee as against the grantor does not apply to patents because the grantor is the government. *Second.* The statute providing that boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the subdivisions for which they were intended, and the length of such lines as returned shall be held and construed as the true length thereof, the plaintiff could take no more than the actual area delimited *by the lines shown upon the plat*, including the meander line, such lines, in contemplation of law, being actually run, marked and returned. *Third.* The decision in the *Schurmeier* case holding that meander lines are not boundaries but merely indications of the water-line by which the tract is to be bounded, *does not apply to such a case. Fourth.* The meander line, as delineated upon the plat, limited the grant under plaintiff's patents.

In his opinion subsequently delivered in the Circuit Court for the northern district of Ohio, upon the trial of the suit of Niles vs. Cedar Point Club (quoted by Judge Lurton in the Circuit Court of Appeals, 85 Fed. Rep., 54), *Mr. Justice Harlan* said of this case: "I concur entirely with what was said in James vs. Howell, 41 O. St., 696."

That suit of *Niles vs. Cedar Point Club* involved a similar con-

troversy—though between different parties—growing out of the same survey. The decision of *Mr. Justice Harlan* at circuit was affirmed by the Court of Appeals for the sixth circuit in a luminous decision reported in 85 Fed. Rep., 45,, and the decree of that court was affirmed here in a decision reported in 175 U. S., 300.

Mr. Justice Brewer, writing the opinion of this court, said (pages 305-8):

"But little can be added to the opinion of the Court of Appeals, whose conclusions we approve. The meander line run by surveyor Rice along the northern borders of the tracts patented to Margaret Bailey may not have been strictly a line of boundary, *Railroad Co. vs. Schurmeier*, 7 Wall., 272; *Hardin vs. Jordan*, 140 U. S., 371, 380; *Horne vs. Smith* 159 U. S., 40; but it indicated that there was something which *had stopped the survey*, which limited the area of the land which the United States was proposing to convey, and left to subsequent measurements the actual determination of the line of separation between the land conveyed and that which the government did not propose to convey. Generally, these meander lines are lines which course the banks of navigable streams or other navigable waters. Here, it appears distinctly from the field-notes and the plat, that the surveyor, Rice, stopped his surveys at this "marsh," as he called it. These surveys were approved and a plat prepared which was based upon the surveys and field-notes, and *showed the limits of the tracts which were for sale*. The patents, referring in terms to the survey and plat, clearly disclose that the government was *not intending to and did not convey* any land which was a part of the marsh. * * *

"It may be that the surveyor, Rice, erred in not extending his surveys into this marsh, but *this error does not enlarge the title conveyed* by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and *one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the government was offering for sale.*

"It may be true that under his contract, the requirements of the statute and the regulations of the land department, Rice should have extended his surveys to the shore of Lake Erie, but he did not do it; he stopped at the borders of this marsh, and the land department in effect approved his action. And it may be remarked in passing that the letter of the statute would not limit the survey to the shore of the lake, for section 2395 of

the Revised Statutes declares that surveys shall be made by running lines *at right angles,* 'so as to form townships of six miles square, unless where the line of an Indian reservation or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.'

"But Lake Erie is not an Indian reservation, nor a tract of land heretofore surveyed and patented, nor a navigable river. It is true, section 2396, which provides how the boundaries and contents of the several sections, half sections and quarter sections of the public lands of the United States shall be ascertained, says, after stating the rule where all the corners are established, that 'in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary line shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary lines, or other external boundary of such fractional township.'

"If this recognizes any other external boundary than that which is indicated in section 2395, it does not prescribe what that external boundary shall be, and if the land department treats either a marsh or a lake as such external boundary, who can declare that its action is void? * * *

"Of course, *if the fractional sections patented to Margaret Bailey did not border on some body of water, there were no riparian rights,* and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh—whether it became more or less subject to overflow—would not alter the fact that the rights of Margaret Bailey, the patentee, were *limited to the very lands which were conveyed to her,* and for which she paid, *and did not extend over the meander line* into the territory north. But it is urged that the fact that a meander line was run amounts to a determination by the land department that the surveyed fractional sections bounded upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field-notes and plat, that that which was lying beyond the surveyed section was 'flag marsh' or 'impassable marsh and water.' *But there is no such magic in a meandered line;* all that can be said of it is that it is an irregular line *which bounds a body of land,* and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

By that decision it is distinctly announced, (1) that the boundaries indicated upon a plat which is based upon surveys and field-notes, *show the limits of the tracts to be sold;* (2) that patents, referring to survey and plat clearly disclose that the Government does not intend to convey any land which lies beyond the limits so shown; (3) that the failure of the surveyor to extend his survey beyond the meander line does not enlarge the title conveyed by patents for the fractional lots; (4) that one receiving a patent will not ordinarily be heard to insist that, by reason of an error on the part of the surveyor; more land was bought than was paid for, or than the Government was offering for sale; (5) that the statutes governing the survey of public lands prescribe the mode of ascertaining the boundaries and contents of those portions which have been surveyed; (6) that no one can declare void an external boundary adopted by the land department; (7) that the rights of a patentee are limited to the precise lands which are conveyed by the patent; (8) that, if they are shown to extend to a meander-line which was not laid down along a stream or body of water, they do not extend beyond the meander boundary; (9) that there is no magic in a meandered line, and that all that can be said of it is that it is an irregular line which *bounds a body of land,* and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation.

The principles thus declared are conclusive of the cases now before the court, and require the affirmance of the judgments of the Supreme Court of Minnesota.

The *Niles* case was not, however, the first in which this court had considered and determined many of the propositions embraced within its decision. The same questions had been presented in *Horne vs. Smith,* the facts in which have already been stated in this brief at pages 36-7. The facts in that case differed from the situation developed in the present suits only in the immaterial circumstances that an *erroneous* (not a *fictitious*) survey had been made, and, in the course of it, a meander line purporting to run along the Indian river had been, in fact, run along a bayou lying to the east of the river. This court held that there had been "simply an omission to make any survey of the tract west of the bayou and between it and the main body of the Indian river."

The opinion then continued:

"It is unnecessary to speculate why it was that it was not surveyed. It may have been a mere oversight, or it may have been because the surveyor thought that the action of the water would soon wash the low land away; but whatever the reason, the fact is obvious that no survey was made of that body of land, and the boundary line fixed was the water line of the bayou. * * * Now, if this tract west of the bayou and between it and the Indian river, was intended to be surveyed, obviously all the lines of sections 23 and 26 would have been run along straight lines, and so as to make complete sections and quarter sections; but such lines, at least those on the west side, were not run, and, whatever the reason, the survey stopped at the water line of the bayou and left this body of land west thereof wholly unsurveyed. Although it was unsurveyed, it does not follow that a patent for the surveyed tract adjoining carries with it the land, which perhaps ought to have been, but which was not in fact, surveyed. And when it is clear from the plat and the survey that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it. Cases of this nature are naturally few in number."

The cases of *Lammers vs. Nissen*, 4 Neb. 245, Glenn vs. Jeffrey, 75 Ia., 20, and *Whitney vs. Detroit Lumber Co.*, 78 Wis., 240, are then cited by the court as supporting the same doctrine.

It will thus be seen that the ruling principles applied in the *Niles case* had been previously recognized and applied by this court. The result that would follow the *error* of the surveyor would equally follow his *deliberate fraud*. (*Kirwan vs. Murphy, supra.*)

Plaintiff in error insists that, under the decision in *Horne vs. Smith*, if the body of water named be not the boundary, some other must be, for the fractional lots are at all events, entitled to *a water boundary*.

This brings the argument for the plaintiff in error down to this: If the plat indicate that a tract of land abuts upon a certain body of water, it shows to a demonstration that the grant of that land carries title to the body of water specified, *or to some other body of water not indicated upon the plat*.

If this be true, the whole contention of the plaintiff in error is abandoned, and the foundation of its case instantly crumbles; *the patent and plat cease to be controlling*, and the extent of the grant rests upon extrinsic facts concerning which the granting instruments are silent.

1162

As to such facts the plat can never be a guide, and the indicated boundary may, or may not, be the actual boundary. The force imputed by the plaintiff in error to a call for a natural monument is thus conceded to have no reality.

This court, however, has given a definitive answer to the contention of the plaintiff in error respecting a water boundary:

> "But it is urged that the fact that a meander line was run amounts to a determination by the Land Department that the surveyed fractional sections *bordered upon a body of water*, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights. * * * There is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found *forest or prairie, land* or water, government or Indian reservation." (*Niles vs. Cedar Point Club*, 179 U. S., 308.)

In *Lammers vs. Nissen*, cited *supra*, it appeared that, between the meander line as run and the Missouri river, there was a tract of several hundred acres, and the court held that, although, as to public lands of the United States, a meander line is generally conceded to follow the windings of a stream, yet the question whether it does so or not may be determined by evidence *aliunde;* the mere fact that it is run and designated upon the plats as a meander line *is not conclusive.*

The court also held that, as the body of land referred to had not been surveyed, it did not pass under a patent of a fractional lot which, upon the government plat, extended to the meander line.

This case was followed in the Supreme Court of Nebraska by *Bissell vs. Fletcher*, 19 Neb., 745, which was an action in ejectment to recover land in possession of defendant, which plaintiff claimed was part of a fractional lot to which he held the patent title. An appeal was taken from a judgment entered for the defendant. The facts and the rule of law applied thereto cannot be better stated than in the words of *Justice Maxwell*, who delivered the opinion of the court:

> "There is no dispute about the essential facts in the case, and they are as follows: The plaintiff is the owner of lot 3, in section 31, township 2 N., range 18 W., and is entitled to, and is in possession of the same, except as hereinafter stated. This

lot, as shown by the plat and patent introduced in evidence, contains 52.60 acres. The plat shows that the southwest corner of the lot extends to the north channel of the Republican river, and there is some testimony tending to show a meander line between the river and the south line of said tract. The defendant is the owner of lots 6 and 7 in said section, and was the owner thereof at the commencement of this action. These lots lie south of lot 3, and in fact, between it and the river as it flows at present. The contention of the plaintiff is that lot 3 extends to the river; and, notwithstanding the fact that lot 3 contains all the land the plaintiff purchased and paid for, and the effect of the extension of the line would be to give him about 117 acres of land, to which he seems to have no equitable right, still he contends the law to declare the land to be his. *It is also shown that lots 4 and 5 in said section, if the plaintiff is entitled to recover, would also be extended to the river, and absorb a considerable portion of the tract that the plaintiff claims.*

"There is a paucity of testimony as to the character of the channel of the river, along which the meander lines are run. Whether in fact the river flowed there at the time the original surveys were made, in 1865 and 1869, is not proved. The testimony tends to show that the river at the present time flows about three-quarters of a mile south of lot 3. As to when this change of the channel took place there is no proof. It is not claimed, however, nor is there any proof, that lots 6 and 7 are an accretion to lot 3. The case, therefore, is similar in most respects to that of *Lammers vs. Nissen*, 4 Neb., 245, which was affirmed by the supreme court of the United States (25 Co-op. ed., 562)."

A still later case, *Harrison vs. Stipes*, 34 Neb., 431, presented a similar controversy, where the plaintiff established a complete chain of title, from the United States to himself, to fractional section 8, purporting to embrace 40 acres of land, and as to which the defendant filed a disclaimer. The opinion recites:

"It appears that said fractional section 8 was surveyed by the United States in 1856. The east and south boundaries of the section consisted of a meander line near the west bank of the Missouri river. * * * It further appears from the testmony of plaintiff's witnesses—and we fail to find any evidence in the bill of exceptions to the contrary—that *the original survey did not extend to the river*, and that the strip lying east of the meander line was covered with a growth of willows and cottonwoods at the time of the survey. While the testimony

shows that this land was occasionally subject to overflow, yet it also appears that it lay above the usual stage of water in the river. Since said survey, and after the patent was issued for the forty acres, the channel of the river has changed further east a considerable distance. The plaintiff's claim to any portion of the strip lying between the meander line and the present channel of the river is not well founded for the reason that *it is not an accretion* to the plaintiff's land. The case falls within the rule announced in *Lammers vs. Nissen*, 4 Neb., 245, where it is held that 'an entry of government land, bounded by a meander line, does not include land lying at the time between such meander line and the bank of the river.' "

Glenn vs. Jeffrey, 75 Ia., 20, also cited by *Mr. Justice Brewer* in *Horne vs. Smith*, was a case where the plaintiff had become the owner of the patent title of fractional lot 3, bounded by a meander line which the government plat and field notes described as the line of the Missouri river. This line, in fact (as in the Horne case), marked the edge of a bayou some distance from the river, and between which and the river lay certain lands not otherwise surveyed, and which were occupied by the defendant. *Chief Justice Seever* delivered the opinion of the court, saying:

"There was no controversy as to the facts. It is true that the government plats and field notes described the meander line as being at the Missouri river, and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of running the meander line along the river, it was run along a bayou some distance from the river. The land in question cannot be regarded as accretion, but existed as it now does when the survey was made. The court rightly directed the jury to find for the defendant. *The land never was in fact surveyed* by the government, and never sold or conveyed to the plaintiff. It is true, the meander line is not a boundary line (Kraut vs. Crawford, 18 Ia., 549), and if the evidence in this case showed the river had been meandered, this case would be like the case cited; but there is a material distinction between them. In the case cited the river had been meandered, and the land in controversy had been formed by accretion, *since the survey and sale of the land by the government.*"

The controlling fact in *Glenn vs. Jeffrey* was that the survey stopped at a certain point, not that there existed a bayou at that

point. The existence of the bayou explained, perhaps, why the survey stopped where it did, but, as in the *Horne case,* that fact had no greater significance, it appearing that no survey of the land had been made beyond the meander line.

The doctrine of *Glenn vs. Jeffrey* was sustained by the same court in *Grant vs. Hemphill,* 92 Ia., 218, very closely resembling in its facts the cases at bar. The land in controversy was the Eastern part of what was claimed to be section 19. According to the government maps and plats, all of the section, except the W½ of the NW¼ and another tract of 221 acres, was designated as under water. The 221 acres were subdivided into five lots numbered 1 to 5 inclusive. All of the surveyed land was situated in the westerly part of the section, extending from a point on the north line, a little more than half across the section, to a point on the south section line 80 rods east of the southwest corner; the easterly line of the survey appeared to be a meander line of Mud, or Lost Island, lake. The plaintiff was the owner of the five lots by a proper chain of conveyances from the government. It was admitted by plaintiff that the specified quantity of land (221 acres) was contained in the five lots without including any part of the land designated on the government plat as under water. "In other words," says the opinion of the Supreme Court, "so far as appears, he has the full complement "of land which he purchased within the meander line."

After purchasing the lots, plaintiff claimed the whole of the section east of the meander line, by reason of his ownership of the fractional lots. The land contended for probably had never been any part of a lake, and there was no evidence in the case that, at or near the time of the survey, or since, there had been any body of water anywhere on the land upon which to base a meander line, except the inlet to Mud Lake which ran across the southeast corner of the lands, and in which the water of the lake backed up in times of floods. The defendants in the case had taken possession of the land for the purpose of entering it for homesteads. The plaintiff's action, to quiet title, was based upon those entries by the defendants. As to the basis of plaintiff's claim, *Judge Rothrock,* who delivered the opinion, said:

> "It is a claim of ownership because he is the owner of the adjoining land. If his ownership on this ground is well founded he is entitled to a decree quieting his title; if he has

1162

no title to the land, he has no more right to the possession than the defendants. In other words, if the land in dispute is not owned by the plaintiff, and is not surveyed, and cannot be sold or disposed of until it is surveyed, it is part of the public domain, to which no one can acquire either ownership or right of possession.

"We come now to the material question in the case. A section of land is supposed to contain 640 acres. If section 19 had been all surveyed, it would have embraced a less number of acres, being what is known as fractional. As we have said, the five lots owned by the plaintiff contain 221.36 acres, and the W. ½ of the N. W. ¼ is marked on the plat of the government survey as containing 58.93 acres. If the section were not fractional, the plaintiff's claim would be a demand for a decree quieting title in him to more than 360 acres of land based on the ground that he is the owner of 222 acres of land adjoining, of which he is a riparian proprietor, and he makes this demand in a court of equity. *A riparian proprietor is one who owns land bounded upon a water course or lake.* The evidence in this case shows that there was not at the time of the government survey, and is not now, any body of water east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner. In the large mass of authority collected and cited by counsel, we find no case which can be said to sustain a claim made upon any such state of facts. It is well understood that a meandered line is not a line of boundary. It is supposed to be along the shore of a body of water, and to follow the windings of the stream or lake, and the sinuosities of the banks. In such case, and where it appears that the government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant, to the water's edge. *Kraut vs. Crawford,* 18 Ia., 549. *But no such condition is found under the evidence in the case at bar. There is not, and has not been, any body of water upon which to locate a meandered line."*

The court then quoted the rule in the *Schurmeier* case to the effect that a meandered line is not a boundary, and continued:

"We have cited this well settled principle, not for the purpose of approving and following it,—for it is known and understood everywhere to be the correct doctrine,—but *to show that the meandered line and the banks of a stream or shore of a lake cannot be held to apply where there is no body of water to which it can be referred.* * * *

"We hold that all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title, except through the regular government methods adopted by the general government for the disposition of the public lands. The decree of the district court is affirmed."

The authority of this decision is assailed by plaintiff in error upon the assertion that it has been overruled by the later case of *Schlosser vs. Cruickshank,* 96 Ia., 414, an action presenting a question of *riparian rights* where the meander line was actually run about a lake existing where it was located upon the plat. So far from overruling *Grant vs. Hemphill,* that decision was carefully distinguished, and practically reaffirmed, in this language:

"In *Grant vs. Hemphill,* a meandered line had been run, but there was no adjacent body of water upon which to base such a line, nor had there ever been such a body of water. In speaking of a meandered line in *Grant vs. Hemphill,* this court said:

" 'In such cases, and where it appears that the government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant, to the water's edge.'

"In these cases there was a body of water to meander. There was a meander line run, which appears on the plat of the government survey as coincident with the line of the lake."

But any weight that might otherwise be given to this case of *Schlosser vs. Cruickshank* was destroyed by the announcement of the Iowa Supreme Court in the recent decision of *Schlosser vs. Hemphill,* 90 N. W. Rep., 842 (not yet officially reported), to the effect that the conclusion in the *Cruickshank case* was erroneous owing to the confusion of its facts with those of another case in connection with which it was submitted for decision, the arguments having been made solely in the latter case.

This late case of *Schlosser vs. Hemphill* arose out of conditions differing from those in the present suits only in the circumstance that it did not appear that the survey was fictitious and fraudulent. In deciding the case against the plaintiff, the Iowa Supreme Court thus clearly states the rule:

"When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore, and as a means of ascertaining the quantity

of land to be paid for by the purchaser. *Schlosser vs. Cruickshank, supra,* and authorities therein cited. In such a case, if the meander line does not coincide with the bank of the lake, but is so run that land lies outside, and between it and the shore, the adjoining owner will usually take title to the actual shore line; and it may doubtless be properly conceded that no subsequent resurvey by the government, *in the absence of fraud, or error so gross as to be in the nature of a fraud, in the original survey,* could affect his title thereto. *Mitchell vs. Smale,* 140 U. S., 406. **But, where there is no adjacent body of water proper to be meandered, the rule we have mentioned will not apply. In such a case the meander line will be a boundary line, and one who purchases from the government according thereto cannot claim title beyond it.** *Grant vs. Hemphill,* 92 Ia., 218; *Livestock Co. vs. Springer,* 22 Sup. Ct., 563."

The quoted statement seems to summarize accurately the law as it is now recognized to exist.

We have frequently referred to the case of *French-Glenn Livestock Co. vs. Springer,* cited in the foregoing opinion of the Supreme Court of Iowa (see pages 13, 15-16, 22, 43), *the facts in which were practically identical with those in these suits and presented the precise questions to be here determined,* and which the Supreme Court of Minnesota (record, p. 86) declared to be conclusive of the cases now here for review.

In that decision this court held: (1) that *the land lying beyond the meander line established by the surveyor was not included within the survey;* (2) that it was not, therefore, embraced in the description of the lots conveyed by the patents or in the deeds under which the plaintiff in error claimed; (3) that the situation upon the ground, and the location of the meander line so as to include or exclude the land in question, were facts to be decided by the jury (or by the trial judge, in the absence of a jury), and, when found, *conclusively determined the controversy;* (4) that, while the descriptions of the lots contained in the survey, plats and patents may be *conclusive against the government,* and its grantees, *so far as the lands actually described and granted* are concerned, yet *such descriptions cannot be held to extend to lands not included within the lines of the survey;* (5) that, if the lake did not exist as *an actual and visible boundary on* the line of the lots as shown upon the plat, the lots cannot be extended, either directly or laterally, to adapt them to

the neighboring lake, and that the rights of the patentees and their successors in title must be regarded as existing *within the actual lines and distances laid down in the survey,* to the extent of the acreage called for in the patents; (6) that, in such cases, *the meander line is intended to be the boundary line of the fractional lots.*

The essential facts in the cases at bar correspond almost precisely with those in the *Springer case.* The present cases are the stronger in the circumstance that their meander line was arbitrarily and fraudulently laid down by the deputy surveyor instead of being misrepresented, as was probably true in the *Springer case,* by the *mistake* of the surveyor.

A short time prior to its decision of the *Springer case,* the Supreme Court of Oregon had before it for decision a similar suit in which the same questions of law were presented, which it decided in the same way. We refer to the case of *Barnhart vs. Ehrhart,* 33 Ore., 274, where the law was thus stated:

> "When *for any reason* the surveyor omits to include large tracts of land lying between the meander line as surveyed, *or as pretended to have been run upon the ground,* and such streams or bodies of water, the patents for the lots, though referring to the official plat of such survey for identification, are not equivalent to a conveyance of the premises to such navigable stream, lake or bay, but *are grants limited by such meander line.*"

The Supreme Court of Illinois, in *Fuller vs. Shedd,* 161 Ill., 462 (recently affirmed in this court *sub nom. Hardin vs. Shedd,* 190 U. S., 508), hold to the same rule:

> "There are cases where the meander line would be of itself the boundary, as where the line run by the government surveyors, by mistake or fraud, in surveying the public lands, leaves between such line and the stream or lake a considerable body of land on which is vegetation, etc., above the ordinary state of water. In such case the surveyed land is all that is granted by the United States and the patentee is not a riparian proprietor, *his boundary being fixed by the meander line.*"

Finally, this principle was recognized and applied by *Mr. Justice Miller* in his charge to the jury, in the case of *Granger vs. Swart,* 10 Fed. Cas., 961.

11629

RECAPITULATION.

The plaintiff in error, being the conceded owner of fractional lots 3, 5, 6 and 7, in section 4 of township 57, range 17 west, Minnesota, said lots being bounded on the government plat (referred to in the patents conveying them) by what purported to be the meander line of Cedar Island lake, brings ejectment against the defendants in error, occupying lands between the lake and the meander line as shown upon the plat, to obtain possession of such lands as a part of said fractional lots, and contends that the plat and patents *conclusively establish the lake as the interior boundary of the lots.*

The defendants in error assert that, under the facts in these cases, plaintiff in error is restricted to the ownership and possession of those lands which lie within the boundary lines shown upon the plat; and they are abundantly supported in their position by the principles of law announced by this court and by other tribunals.

There is no dispute over the facts, and there is little room for controversy as to the law applicable thereto.

1. Undisputed facts: The reported survey was fraudulent, the meander line was never run, and the field-notes upon which the plat was based were fictitious.

The established law: The fraudulent action of the deputy surveyor did not estop the government, or extend the limits of the grants under the patents. (Point II of this brief, pp. 11-14; *Kirwan vs. Murphy*, 189 U. S., 35; *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, 51; *Niles vs. Cedar Point Club*, 175 U. S., 300, 306).

The patents and plats are not conclusive that the fractional lots abut upon Cedar Island lake, or upon any water boundary; they are conclusive only as to the lands included within the lines of the survey shown upon the plat. (Point III of this brief, subdiv. 5, pp. 19-35; subdiv. 6, p. 43; subdiv. 7, pp. 46, 47-8, 56-7; *Niles vs. Cedar Point Club*, 175 U. S., 300, 306, 308; *French-Glenn Livestock Co. vs. Springer, ubi supra*).

2. Undisputed fact: The land in controversy has never been surveyed.

The established law: Patents convey only land that has been surveyed, and unsurveyed lands belong to the public domain and are subject to the control of the Land Department. (Point III of this brief, subdiv. 4, pp. 18-19; *Kirwan vs. Murphy, supra*; *Niles vs. Cedar Point Club, supra*; *Horne vs. Smith*, 159 U. S., 40).

3. Undisputed facts: No lake existed where the meander line was laid down upon the plat; Cedar Island lake has never approached the meander line within a distance varying from one-half of a mile to a mile; the intervening land now is, and always has been, high, rolling land of good agricultural quality, heavily timbered with trees of more than a century's growth, extending to the water's edge.

The established law: Whether Cedar Island lake was the actual boundary of the fractional lots of plaintiff in error was a *question of fact* for the trial court to decide, which was in nowise concluded by the call for a meander line. (Point II of this brief, pp. 14-15; *French-Glenn Livestock Co. vs. Springer, supra*; *Niles vs. Cedar Point Club, supra*).

Under such facts, the call for the lake as a natural monument is a false call which it would be absurd to retain, and the rule respecting the supremacy of natural monuments is *ipso facto* rendered inapplicable. (Point III of this brief, subdiv. 5, pp. 22-27; *White vs. Luning*, 93 U. S., 514).

Such facts relegate the inquiry for boundaries to the survey returned, and to the statutory method of determining therefrom the limitations of the grants. (Point III of this brief, subdiv. 5, par. *Second*, pp. 27-32).

Under such facts, the rule in the *Schurmeier* case has no application, nor are the decisions in *Hardin vs. Jordan* and *Mitchell vs. Smale* applicable or controlling. (Point III of this brief, subdiv. 5, pp. 32-34).

By every rule of construction the clear *intent* of the parties, as derived from the granting instruments, is disclosed to convey only the lands of which plaintiff in error is concededly in possession. (Point III of this brief, subdiv. 6, pp. 35-45).

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Such facts, also, conclusively establish that the fractional lots do not extend to the lake. (Point III of this brief, subdiv. 6; *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, 54).

On the other hand, *the meander line is conclusively fixed as the boundary of the fractional lots,* and plaintiff in error is restricted to the lines and distances laid down in the purported survey according to which the lots were granted. (Point III of this brief, subdiv. 7, p. 45; *Bates vs. Illinois Central R. R. Co.*, 66 U. S., 204; *Horne vs. Smith, supra*; *Niles vs. Cedar Point Club, supra*; *French-Glenn Livestock Co. vs. Springer, supra,* p. 52).

As the plaintiff in error must recover upon the strength of its own title, and is confessedly in possession of all the lands described in and conveyed by the patents under which it claims, the judgments of the Supreme Court of Minnesota must be affirmed.

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JOHN R. VAN DERLIP,

R. R. BRIGGS,

Counsel for defendants in error.

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SUPREME COURT OF THE UNITED STATES

October Term, 1903.

Nos. 127, 128.

SECURITY LAND & EXPLORATION COMPANY,
Plaintiff in Error.

vs.

G. A. BURNS and MARY L. BURNS, his wife,
Defendants in Error.

SECURITY LAND & EXPLORATION COMPANY,
Plaintiff in Error.

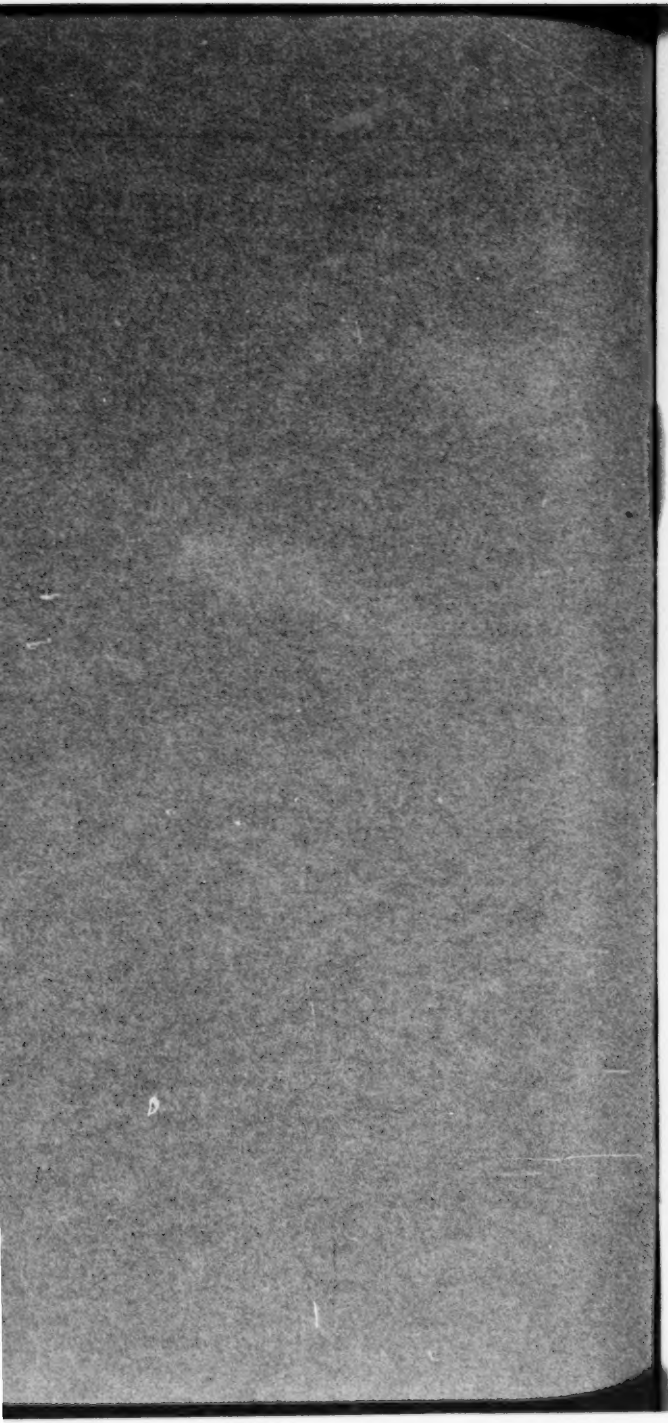
vs.

HENRY WECKEY and ROSALINE S. WECKEY, his wife,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

GEORGE P. WILSON,
JOHN R. VAN DERLIP,
R. R. BRIGGS,
Counsel for defendants in error.



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TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

MENTAL BRIEF FOR DEFENDANTS IN ERROR.

inting the argument for defendants in error in these ave received the brief for the plaintiff in error, which ust, because of its copious citation of cases, as well as of ive presentation of the theory upon which this court is everse the judgments under review, sufficiently excuse comment thereon by us.

ct of much of the brief there may be applied, not inap-, to its author, the words of the poet addressed to the

"Thou say'st an undisputed thing in such a olemn way."

This is true particularly of the principles enunciated in the copious citations from decided cases in points First and Second (pp. 19-57).

The plaintiff in error has here reduced its contention to its lowest terms, and submits the suits upon the simple proposition (p. 13) that "the case is governed by the elementary rule that monuments prevail over courses, distances and quantities." (See our former brief, p. 7).

For the first time, all parties to these suits are now agreed upon the following propositions:

1. That the government system of surveys aims to lay out public lands in *symmetrical forms* (Plaintiff's brief, p. 41).

2. That the plat is a mere picture or daguerreotype of the survey (pp. 15, 41, 84).

3. *That a monument impossible of application is no monument at all* (p. 45, par. 7).

4. That there are cases which lie entirely beyond the pale of the rule giving monuments supremacy over all other calls of the survey (p. 63).

5. That corners and boundaries actually marked upon the ground by a surveyor are controlling (p. 71).

We may even assent to counsel's proposition that, if monuments intentionally adopted are attacked for error *only because they are more distant* from each other than returned by the surveyor, and so enclose a larger area than intended, the error, *for the purposes of construction,* will be imputed to the distances and not to the monuments (p. 45, par. 7).

Conceding these points, it would seem as if plaintiff in error conceded that the judgments of the Supreme Court of Minnesota must be affirmed; nevertheless, the contrary is still urged.

I.

Under Point First, it is insisted by plaintiff in error that the rule that monuments prevail over the courses, distances and quantity given in the field-notes of a survey is *universal*.

We concede this to the extent that the declarations quoted in the brief go and were intended to go. All that they signify, or were intended to signify, is that the rule embodies a principle of law which is everywhere accepted. **They do not mean, and were not intended to mean, that it offers the sole means of solution of every controversy that may arise respecting boundaries.** The fundamental error in the contention of the plaintiff lies in the failure to observe the distinction between **universal acceptation** and **universal application.**

It is undeniably true (notwithstanding counsel's assertion to the contrary, p. 39) that courses and distances, and the monuments at which they are reported to terminate, are presumed to agree. When they do agree there is no occasion for construction of the terms of the grant. It is only when they are conflicting that construction must be resorted to, and it may be conceded that, in such instances, the first rule of construction to be invoked, *if the facts in the particular case will admit of its application*, is the rule relied upon by plaintiff in error. Yet, when the facts are such that this rule is inappropriate, recourse must be had to another rule. If this were not true, there would be no occasion for the existence or recognition of any other canon of construction than the one under discussion. If that be *universal* and *absolute*, as is urged, no conflicting canon would ever have been formulated. The decisions cited by counsel arose under the distinguishing conditions referred to by him (p. 40), where the country was thickly settled and the title to every tract was of ancient origin and demarked by well-known streets or roads or immemorial adjoinders. The spirit of those decisions did not contemplate their application to the conditions presented by careless *or fraudulent* surveys in wilderness regions of trackless forests in the west, and their language can not be held to support conclusions neither intended nor imagined by the jurists who employed it.

Still, that language states a rule of construction as accurate today in Minnesota, and in every other jurisdiction, as when it was uttered.

Does counsel mean to say that courses and distances are *never* resorted to for the purpose of ascertaining the intent of the parties to a grant, or to limit its scope? Was this court guilty of gross oversight of a principle so long recognized and so universally established, as counsel's citations demonstrate, when, in the case of *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47—substantially identical with the cases at bar—it rejected the natural monument (actually to be found in the vicinity) and said:

> "If there never was such a lake—no water forming an *actual* and *visible* boundary—*on* the north end of the lots, it would seem unreasonable either to prolong the side lines of the survey indefinitely until the lake should be found, *or to change the situs of the lots laterally in order to adapt it to a neighboring lake.* The jury having found that the facts under this issue were as claimed by defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded *as existing within the actual lines and distances laid down in the survey,* and to the extent of the acreage called for in the patents, and that the meander line was intended to be the boundary line."

Did it not, rather, strictly and accurately declare the true principle when it announced in *White vs. Luning*, 93 U. S., 514:

> "It is true that, as a general rule, monuments, natural or artificial, referred to in a deed, control on its construction rather than courses and distances; *but this rule is not inflexible, it yields* whenever, taking all the particulars of the deed together, it would be absurd to apply it."

And was it not right when, in the case of *Niles vs. Cedar Point Club*, 175 U. S., 300, it held that there is no magic in a meander line, and that "all that can be said of it is that it is an irregular "line which bounds a body of land, and beyond that boundary there "may be forest or prairie, land or water, government or Indian "reservation"?

THE DECISION OF THIS COURT IN KIRWAN VS. MURPHY IS CONCLUSIVE HERE.

The doctrine contended for by plaintiff in error is precisely that upheld by the lower courts in *Kirwan vs. Murphy* (83 Fed. Rep., 275; 103 Fed. Rep., 104; 1109 Fed. Rep., 354), namely, that the reference to Cedar Island lake in the survey and upon the plat constituted it a natural monument to which the survey must be deemed conclusively to have extended, and which thereby became the actual boundary of the fractional lots. Upon appeal, this court (189 U. S., 35) declined to apply the rule, and held that the fractional lots did not, as a matter of law, extend to the natural monument called for.

That case was brought by Murphy and others, owners of substantially all the fractional lots surrounding Cedar Island lake except those involved in these suits, to restrain a survey by the government of the land lying between the Howe meander line and the lake, pursuant to a contract made by Kirwan, as U. S. Surveyor General for the District of Minnesota, with his co-defendant, Crosswell, a deputy surveyor.

The complainants were the owners of the fractional lots by mesne conveyances from the patentees, and alleged that they had bought the lands for value, without knowledge of the inaccuracy or fraud of the survey, and were induced thereto particularly by the fact that the lots bordered upon the lake, thus affording facilities for floating their logs to market. The defendants answered, setting up the fictitious nature of the survey, and the facts which appear in the findings in the cases at bar were substantially disclosed and found in the *Kirwan case*.

The Circuit Court decreed that **the complainant's lots extended to, and were bounded by and upon, the actual waters of Cedar Island lake** (189 U. S., 42, 52); that the defendants had no authority to meddle with said lands for the purpose of making a survey of the same, and that a perpetual injunction be issued restraining such survey.

The whole case for complainants (appellees' brief, 189 U. S., 43-5) rested upon the same proposition urged by plaintiff in error here and concisely expressed at the top of page 13 of its brief:

"The case is governed by the elementary rule that monuments prevail over courses, distances and quantities."

The accuracy of that contention was sustained by the Circuit Court of Appeals (83 Fed. Rep., 275; 109 Fed. Rep., 354).

Upon the second appeal, the opinion filed upon the first was adopted and adhered to by the Court of Appeals.

The proposition which controlled the decisions below was distinctly negatived by this court when, upon the postulates that **no survey was in fact made; that no meander line was ever run; that no body of water in fact existed near the false meander line indicated** (189 U. S. 52-3), **and, that the fraudulent action of the deputy surveyor did not divest the Land Department of its power to survey the lands in controversy** (p. 54), it reversed the decrees appealed from and ordered the dismissal of the bill.

The bill having been dismissed upon the grounds stated, the question of title was determined against Murphy and the other complainants; for, if title passed under their patents, the functions of the Land Department in the premises were, necessarily, divested; and the title does so pass, in every instance, where a conveyance, generally called a patent, has been executed and delivered. *Moore vs. Robbins*, 96 U. S., 530, *et id omne genus.* (See Mr. Stanford's brief in *Kirwan* case, pp. 11-12, 126.)

It was also declared that the duty of surveying the public domain is one of the functions of the Land Department, and that the courts had no jurisdiction to restrain the proposed survey by the Department of the lands in controversy. **If, then, the Land Department has now the power to survey the lands surrounding Cedar Island lake, including the lands claimed by the plaintiff in error, it is because the title thereto did not pass under the patents by virtue of which Murphy and his associates claimed, nor under the patents through which plaintiff in error is now claiming. If it did not so pass, then the natural monument, Cedar Island lake, was not paramount in defining their boundaries,** and the rule of *White vs. Luning, supra*, that a false call for a monument will be rejected, is still the rule of this court and will be followed.

It is to be noted, in the cases cited by counsel under Point First, that the decisions by which the extent of their respective grants was arrived at, did not turn upon *extrinsic* facts which of them-

selves were determinative of the controversy, as is the situation in the cases at bar. (*Kirwan vs. Murphy, supra; French-Glenn Livestock Co. vs. Springer,* 185 U. S., 51). Had it appeared in the numerous cases cited in plaintiff's brief that the monument called for in the descriptions was *a fiction,* that it was non-existent, and that its designation was made fraudulently, the courts would have discarded the rule applied by them, with the same unanimity with which they invoked it, for fraud is as active a vitiating element in surveys as in contracts or in any other transactions in which its maleficent presence is disclosed.

II.

Having assumed the position that monuments control, ***absolutely*** and *always,* all other elements of a description, whether right or wrong, plaintiff in error declares, in *Point Second* of its brief, that the reason for this doctrine is that a description of land by reference to monuments imports that the only thing intended to be dealt with is a defined tract segregated by visible marks from the surrounding land. The conclusions are thence deduced that all other elements of the description are simply finger posts to point to the monuments, and that they serve no other purpose; that if they point in the wrong direction or to the wrong place, they become *functus officio* equally as much as if they guided truly; that the call for monuments is so absolute as to overrule even the intention of the parties, and to compel the passing of title to unsurveyed public lands.

We cannot agree to this.

Where the courses and distances, monuments and quantity recited in a grant harmonize, the courses and distances naturally lead to and identify the monuments, and no conflict is presented. Where, on the other hand, the various elements of the description do not concur, so that one or another must be rejected, then, in the absence of extrinsic and controlling facts, *rules of construction* must be resorted to in order to arrive at the purpose of the parties.

> "In the construction or interpretation of written instruments, the intention of the parties as therein expressed is the great object of search. If, while standing in the shoes of the parties

> when the deed was executed and reading it in the light of the then existing facts and circumstances, such as the nature, condition, occupation, etc., etc., of the thing granted, the intention it not apparent, then resort may be had to the rules of construction. Many of these rules are intended to aid in ascertaining the intention of the parties, by pointing out and giving effect to those things about which the law presumes the parties are least liable to make mistakes. *Treat vs. Strickland,* 23 Me. 234, 240. Some are arbitrarily resorted to, 'for want of a better reason, and to be invoked, therefore, if at all, only when all other means fail. If, however, the intention is apparent, it must govern. *Abbott vs. Abbott,* 51 Me. 575, 581."

The foregoing language, taken from the opinion of the Supreme Court of Maine in *Erskine vs. Moulton,* 66 Me., 276, 279, states another "universal" doctrine.

The principle contended for by plaintiff in error is merely one of these rules of construction (*Cox vs. Couch,* quoted at page 47 of the brief for plaintiff in error, *Hale vs. Cottle,* quoted at page 61), and in cases presenting an issue permitting its application, *where no extrinsic circumstances appear to exclude it,* that rule will be given its due force.

Whether the call for the monuments shall be obeyed or not, rests upon various considerations which (as here) are often resolved into a question of fact (original brief for defendants in error, pp. 14-16), the determination of which concludes *the controversy.* (*French-Glenn Livestock Co. vs. Springer,* 185 U. S., 51.) Courses and distances serve as guides to monuments only when monuments *have been actually established* (*Blasdell vs. Bissell,* quoted at page 46 of brief for plaintiff in error), or are *"unmistakable"* (*Pringle vs. Rogers,* 193 Pa. St., 94, quoted by plaintiff in error at the bottom of page 32).

We have already pointed out what is the true reason for the rule that monuments control (original brief, pp. 21, 22). That reason is stated in these words in *Pringle vs. Rogers, supra,* quoted at length on page 31 of brief for plaintiff in error:

> "It [the rule] was not framed because mistakes occurred only from mismeasurement of the surveyor or carelessness of the scrivener in recording the distance; but because experience and observation had demonstrated that the surveyor or engineer *was less likely to mistake* by sight and record the monument *at which he stopped* than his measurement and computation of the distance."

The court then added—"There is nothing in the facts of this case which takes it out of the operation of the rule"—thus recognizing, as we have contended (original brief pp. 22-27), that the "universal" and "absolute" *authority* of the rule upon which counsel so strenuously insists, is not tantamount to its universal and absolute *application;* and that there are cases where the facts, when brought to light, require the abandonment of this rule of construction and the adoption of another properly applicable to the situation disclosed. (*Hutchinson, Land Titles,* §529.)

Expressed in different words, the reason why the Pennsylvania court prefers monuments to other calls of a survey, in proper cases, is because "the marks of the survey that show *the presence of the surveyor on the lines,* and what he did to fix the place of the tract or block *on the ground,* are the monuments of his work by which *his footsteps may be followed* in later years" (*Grier vs. Pennsylvania Coal Co.,* 128 Pa. St., 79, cited by plaintiff in error, pp. 13, 37).

This necessity for the actual *observation* of the monument called for, and the actual *presence* of the surveyor at said monument, in order to locate it and *render it controlling,* is recognized in *Watkins vs. King,* 118 Fed. Rep., 537, when referring to a discrepancy between the courses and distances and the actual location of the monuments called for, it was said:

> "But that is immaterial, if it is made to appear that the natural objects called for *were really in existence* at the time of the survey, *that their location was known to the surveyor,* or that he was *at them* during the time of the survey and marked them or called for them as lines or corners thereof."

If, therefore, the surveyor never "fixed the place of the tract *on the ground*" and was never *at* the monuments pretended to have been fixed, but, on the contrary, adduced his survey and established his monuments solely by the exercise of an unrestricted imagination, the monuments so erroneously established were *not* less liable to be mistaken than the courses, distances and quantity called for by his field-notes. It is possible to follow the surveyor's theoretic footsteps, in such cases, only through the courses and distances returned by him, and, as a necessary result, the monuments called for cease to be controlling.

It is equally true that, if such monuments cannot be found, even with the "guides" given in the field-notes, the conclusion is that they are non-existent or mistaken calls and to be disregarded. The mode of procedure is then apparent, namely, to pursue the courses and distances, and, if they close and embrace the quantity of land bought and intended to be conveyed, the demonstration of their accuracy will be conclusive. (*French-Glenn Livestock Co. vs. Springer*, 35 Or., 312; 185 U. S., 53.)

The distinguished counsel for plaintiff in error become, it seems to us, strangely confused in their interpretation of the language quoted from the various authorities cited upon pages 46 to 54 of their brief, and, particularly, respecting the words of *Chief Justice Marshall* taken from his opinion in *McIver's Lessee vs. Walker*, 9 Cranch, 173 (p. 54).

> "The reason," he says, "of the supremacy of monuments is, that it is the *intention* of every grant to convey *the land actually surveyed.*"

This is not, however, all of the language employed in that connection by the Chief Justice, and a more liberal extract therefrom will even more emphatically disclose its entire accordance with the views advanced here by the defendants in error.

> "All lands are supposed to be actually surveyed, and *the intention of the grant* is to convey the land according to that actual survey; consequently, if marked trees and marked corners ***be found*** conformably to the calls of the patent,

> or if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects.
>
> *The reason* of the rule is, that it is *the intention* of the grant to convey *the land actually surveyed*, and *mistakes* in course and distances *are more probable* and more frequent than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described."

It will be observed, *first*, that, in direct antagonism to the frequent assertions of plaintiff in error, the doctrine is explicitly accepted that *the controlling element of a grant is the intention of the parties*. We have discussed this in our original brief (pp. 35 to 45).

Second. The language is carefully qualified so as to announce that, if monuments called for, either natural or artificial, be "found," they will control courses and distances. But, as shown in our former brief (pp. 19 to 27), to be "found" means their actual and visible existence, within such distance of the location indicated in the survey as not to constitute them either impossible calls (as in these cases) or calls not intended by the parties. (*French-Glenn Livestock Co. vs. Springer*, 185 U. S., 51.)

Third. The rule laid down by *Chief Justice Marshall* concedes supremacy to monuments because "*mistakes* in courses or distances *are more probable* and more frequent" than in respect of monuments. (Compare former brief, pp. 21, 22).

Fourth. It is clearly set down that grants are intended to convey *land actually surveyed*. (See also our original brief, p. 18.)

There is, however, one "universal" rule which does apply to this case, and that is, **Fraud vitiates all things.**

In order to sustain its contention, plaintiff in error must and does assert:

First. That the field-notes of a *fictitious* survey, which specify as a monument a lake *which was never seen by the surveyor*, and which does not now exist and never has existed where it was fraudulently reported by him to be located, import absolute verity and cannot be impeached; and,

Second. That (although it possesses the full quantity of land described in its patents, located exactly where it was specified, and in the form called for by the picture of the survey upon which the patentees relied) *such false and misleading monument must be unquestioningly approved and accepted by this court,* and be adopted as the basis for the application of an "absolute" and inflexible rule of construction, which will extend the grant for which the government was paid so as to include more than twice as great an area as was paid for.

Differently expressed, this court is asked to ratify and confirm the fictitious and wholly erroneous survey of the lands in question, which the Land Department has rejected, and to declare it of equal efficacy and application with the accurate product of an honest discharge of duty.

If Howe had actually run out upon the ground, and marked, the lines of the fractional lots in section 4 to conform to the present claims of the plaintiff in error (see plat, p. 43 of our original brief), his survey would necessarily have been rejected, as it would overturn the primary object of the statute, to-wit: a rectangular division of public lands by lines run to the cardinal points. By what authority, then, can this court pronounce his fictitious return to be equivalent to such an actual survey, and, thereupon, declare it lawful and controlling? In this connection, attention is directed to the plat of the subdivision of these fractional lots appearing in the report of *Kirwan vs. Murphy*, 189 U. S., upon page 43. It will be noted that there the proposed subdivision of the unsurveyed lands surrounding Cedar Island lake is entirely different from the subdivision here claimed by plaintiff in error and shown in our plat (page 43 of original brief), as well as at variance with the subdivision insisted upon by counsel for the appellees in the *Kirwan* case, appearing at page 102 of the Stanford brief. It is certain that all of these plats cannot be correct. It is equally certain that, if either be correct, the terms of the grant must demonstrate it; but it cannot be rationally asserted that any such demonstration can possibly be made.

In *Kirwan vs. Murphy, supra,* this court has already declared that the government is not bound by the fraud of the surveyor, yet the plaintiff in error urges that this adjudication be overruled by a decree in these cases adjudging it to be the owner of lands which were

not conveyed by the patents from the government, and so, indirectly, divesting the government title thereto. It has been always recognized that the administration and control of the public domain rests exclusively in the Land Department, and that courts have no power to interfere with its due performance of its functions; yet it is now insisted that this court not only can, but should, both decree a survey of the unsurveyed lands in controversy, and by the same decree, convey those lands without consideration to the plaintiff in error.

In short, *the plaintiff in error founds its entire case upon a monument concededly fraudulent*, and asks this court to except these suits from the operation of the universal rule to which we have last referred.

If the issue presented for decision in any case involve matters that render the rule advocated by plaintiff in error inapplicable or inconclusive, resort will be had to other principles. And so it has been held that if the call for the natural monument be *a false call,*—whether due to mistake or ignorance as to its true location (as in *New York Land Co. vs. Thompson*, 83 Tex., 169); or to the fact that it did not exist *where laid down by the surveyor*—although not actually non-existent (as in *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47); or to the fact that, for undisclosed reasons, the survey terminated before reaching the monument called for (as in *Horne vs. Smith*, 159 U. S.,40; *Niles vs. Cedar Point Club*, 175 U. S., 300; *Granger vs. Swart*, 10 Fed. Cas., p. 961; *Lammers vs. Nissen*, 4 Neb., 245; *Bissell vs. Fletcher*, 19 Neb., 745; *Harrison vs. Stipes*, 34 Neb., 431; *Glenn vs. Jeffrey*, 75 Ia., 20; *Grant vs. Hemphill*, 92 Ia., 218; *Schlosser vs. Hemphill*, 90 N. W. Rep., (Ia.), 842; *Barnhart vs. Ehrhart*, 33 Or., 274); or to the active purpose of the surveyor to deceive (as in this instance; *Kirwan vs. Murphy*, 189 U. S., 35)—it will be rejected, and the courses and distances specified in the survey will be adopted as the criteria of the boundaries of the premises conveyed. (See opinion Supreme Court of Minnesota, record p. 86; original brief for defendants in error, pp. 19-35).

The considerations above set forth render unnecessary a review of the authorities cited so abundantly under points First and Sec-

ond of the brief for plaintiff in error, and characterize the matters there discussed as purely academic.

III.

The Third Point in the brief for plaintiff in error (p. 58) is devoted to a consideration of what is referred to as the "degeneration" of the rule in respect of monuments in the jurisdictions of New York, Texas and Oregon.

When one's eyes are opened to the truth that the rule which is the cornerstone of plaintiff's contention is not of universal *application*, it will be readily perceived that the refusal to follow it in the cases cited from New York, Texas and Oregon indicates accurate judicial discrimination rather than degeneracy. All of the cases referred to, and many others, presented facts precluding the application of the "absolute" and "universal" rule referred to.

If the courts named are in error, they have respectable company, for, in addition to this court (*White vs. Luning*, 93 U. S., 513; *Horne vs. Smith*, 159 U. S., 40; *French-Glenn Live Stock Co., vs. Springer*, 185 U. S., 47), the same doctrine is approved by **Iowa** (*Schlosser vs. Hemphill*, 90 N. W. Rep., 842; see our original brief, p. 57); **Massachusetts** (*Hall vs. Eaton*, 139 Mass., 217, 221; **Minnesota** (Record, p. 86; *Lamprey vs. Mead*, 54 Minn., 290, 299); **Illinois** (*Fuller vs. Shedd*, 164 Ill., 462); **Maine** (*Hamilton vs. Foster*, 45 Me., 32; *Erskine vs. Moulton*, 66 Me., 276; **South Carolina** (*Colclough vs. Richardson*, 1 McCord, 167); **North Dakota** (*Heald vs. Tomsko*, 7 N. D., 422); **Nebraska** (*Lammers vs. Nissen*, 4 Neb., 425); **North Carolina** (*Cansler vs. Trite*, 5 Jones L., 424); **Vermont** (*Bagley vs. Morrill*, 46 Vt., 94); **Justice Miller** (*Granger vs. Swart*, 10 Fed. Cas., p. 961); **Justice Field** (*Field vs. Columbet*, 9 Fed. Cas., p. 12); **Pennsylvania** (*Bently vs. Rickabaugh*, 62 Pa. St., 281); **Missouri** (*Jamison vs. Fopiano*, 48 Mo., 194.

IV.

In its Fourth Point (p. 65), the plaintiff in error asserts that, if, by reason of the magnitude of the discrepancy or otherwise, the government is entitled to relief, it must be sought through reformation *in equity*.

Throughout its brief, the plaintiff in error intimates that the defendants in error rely particularly upon the fact that, if the fractional lots extend to the lake, there will be an excess of area over that recited in the patents (see pages 17, 65, 68, 80, *et al.*).

The fact of a discrepancy in area does not, of itself, effect the invalidity of any title claimed by plaintiff in error. Its force lies in its bearing upon the question of the intent of the parties to the grant, and in its probative influence upon the mind of the trial court upon the question of fraud in the survey (*Fuller vs. Shedd*, 161 Ill., 462, 482). The fraudulent and wholly fictitious character of the survey being established, it follows, as we have already shown, that the title to the land in controversy never vested in plaintiff in error. The controlling influence of this fact that the whole survey was fictitious, and that, consequently, the government is affected by it only so far as it has seen fit to convey lands in accordance with its plat, is wholly overlooked by the opposing counsel.

The defense in these cases does not rest upon the discrepancy in the quantity, but upon the facts that, because of the failure of the deputy surveyor *to make any survey at all*, and of the fictitious character of his return, the lands in question have never been surveyed and did not pass under the patents. Those patents were effectual to convey merely the lands as to which, by reason of the issuance of the patents, the government is precluded from questioning the validity of the survey and the title of its grantees, to-wit: *the lands within the boundaries delimited upon the plat.* Those boundaries do demarkate the grant as far as the government is concerned, but as to the government, the survey did not extend beyond the pretended meander line, which became the boundary of the premises conveyed.

If the land sought to be recovered had been actually—though erroneously—*conveyed* by the patents in these cases, the government might be required to have recourse to a suit in equity, if it sought to avoid the effect of the patents as to the lands *so erroneously included;* but the contention of plaintiff in error can have no force, since its title to the fractional lots actually conveyed by the patents is not assailed in these cases. The lands in dispute having never been surveyed *or patented*, no basis exists for a suit to reform the patents, and the question presented by the Fourth Point in plaintiff's brief is not before the court.

White vs. Burnley, frequently cited and much relied upon by counsel for plaintiff in error (pp. 65, 69, 78, 81, 90), has no bearing on any issue here, but serves admirably to illustrate the errant nature of counsels' attitude in these cases, and their vague appreciation of the real principles involved. The case cited bears no resemblance to these suits. The contest was between the plaintiff, holding a *senior* title to the land in question, under a Mexican land grant, and the defendant, having a *junior* title to the same land. There was no issue of boundaries presented: the limits of the grant to plaintiff were clear and undisputed, and the title to the entire tract *was conceded to have been vested in plaintiff* before the attempted grant to the defendant. The court below held, in express terms, that the survey was not fraudulent. The government acquiesced in plaintiff's title, and it was assailed by defendant solely upon the ground that the boundaries embraced an area greater than that recited in the patent. This court said:

> "Our opinion is that a regular grant (that is, *a completed title*, made by those exercising the proper political power to grant lands) is not open to this objection, by an opposing claimant setting up a younger title. * * * That a case of excess sufficiently gross could arise to justify a proceeding by suit on the part of the state of Texas, to reform a Spanish grant, we do not doubt (*U. S. vs. Hughes*, 11 How. 552); but the question here is not of reform, it is of original nullity."

That is exactly the question in these cases. There is nothing to reform, because the patents do not convey the lands occupied by defendants in error.

The case of *Gazzam vs. Phillips*, 20 How., 372, quoted by plaintiff in error on page 67 of its brief, is directly in point, and the principle there declared is controlling here.

The point now urged by the plaintiff in error was explicitly and earnestly presented to this court by the plaintiff in error in the case of *French-Glenn Livestock Co. vs. Springer*, 185 U. S., 47, and was

as distinctly overruled. In its brief filed in this court, we find this language (pp. 13-14):

> "The patents in this instance, on their face and when read in connection with the plats, conveyed all the public lands up to the line of Lake Malheur; *if by reason of any error or fraud, the survey improperly included or omitted any public land, then the obviously proper mode of correction was a bill in equity*, putting directly in issue the supposed error or fraud. To allow the apparent purpose and legal effect of the patents to be defeated upon proof of error in the plats, does not differ in principle or practical result from canceling the patents in a suit at law."

In the suit of *Kirwan vs. Murphy*, 189 U. S., 35, *this theory was again advanced before this court by the appellees*, and was again held inapplicable to facts as here disclosed. (See Mr. Hanchett's brief, pp. 37-40.)

V.

In its Fifth Point, the effect of the statutory rule of public surveys is now conceded by counsel for plaintiff in error (p. 71) to be as contended for by us, namely, that, right or wrong, the lines and corners "established" by the surveyor control (see our original brief, pp. *et seq.*). The decision in *Ogilvie vs. Copeland*, 145 Ill., 98 (cited upon page 73 of counsel's brief), was manifestly correct, and is in no respect at variance with the position of the defendants in error. In that case, the section corner established by the court had been clearly marked upon the ground, was ascertainable by measurement from another acknowledged corner, and had been recognized by parties owning lands in that vicinity as the government corner for 36 years prior to the decision.

VI.

The Sixth Point of plaintiff's brief (p. 74) presents its so-called "equities."

There are no equities that can be considered here. The plaintiff selected its forum and brought these actions at law to enforce strictly legal rights. Those rights rest solely, however, upon questions of law, as the facts are uncontroverted, and plaintiff seeks to enforce the legal rights which it assumes to issue from those facts. It asserts, and must demonstrate, as matters of law, that its patents actually conveyed the lands in dispute, and divested the government of title thereto and the Land Department of any further jurisdiction over them. If it succeed in demonstrating these things, then *Kirwan vs. Murphy*, 189 U. S., 35, must be overruled. In that case, the plaintiffs, bringing their suit *in equity*, asserted title to the remaining land surrounding Cedar Island lake *by virtue of the very equities* which plaintiff in error now suggests should be considered in its *legal* action, but this court, in reversing that case, distinctly overruled any claim of title by virtue of those equities. (See Mr. Stanford's brief, pp. 17-54.)

VII.

Under its Seventh Point (p. 79), it is urged that plaintiff in error it not chargeable with notice of the fraud on the part of the surveyor or of the discrepancy in the acreage, nor, if it were, would its rights be affected.

We have sufficiently considered these propositions in Point III, subdivision 3, pages 17 and 18 of our original brief.

VIII.

In the Eighth Point of its brief (p. 81), plaintiff in error argues that the facts that the fractional lots will conflict if an attempt be made to extend them to the lake, and that their lines must be deflected in order to accommodate the lots upon the lake, in no way concern the defendants or the government, and present no legal difficulty.

We think these facts are of grave materiality, for the reasons: (1) that they demonstrate the false character of the survey and thereby fix the pretended meander line as its limit; (2) that the law requires that all lines shall be straight lines running east and west

and north and south; (3) that the title to the lots vested in the patentees not as tenants in common, as substantially claimed by plaintiff in error (pp. 83-5, 123), but as individual grantees, at the time of the issuance of the patents; (4) that the fractional lots conveyed by the patents were instantly and severally susceptible of ascertainment (if ascertainable at all) from the terms of the grants; (5) that the boundaries of the grants were governed by some definite rule of law, and none warranting their extension as demanded by plaintiff in error is presented by it, or has ever been suggested in its behalf; (6) that unless the meander line is the boundary, the patents are void for uncertainty, since there is no legal method for determining either the course of the deflection proposed in the boundary lines or the mode of partitioning the excess land among the various owners of fractional lots.

The false natural monument called for by the survey being rejected, if the courses and distances given in the field-notes do not govern, the grants must necessarily be void for uncertainty owing to the irreconcilable interference which will occur the moment any attempt be made to extend the fractional lots. Our discussion of this subject in the original brief (paragraph (e), pp. 39-44) embraces all that we need say.

IX.

In the Ninth Point (p. 86), appears the proposition discussed upon pages 11 to 16 of our original brief, that it is not a material circumstance that Howe fraudulently neglected to perform his duty in the matter of the survey. Numerous cases are cited as sustaining this proposition, but examination will disclose that they were concerned with *valid*, and not *fictitious*, surveys. Defendants in error do not contend that chamber surveys are unlawful or void, and it would serve no good purpose to review the authorities cited by counsel. With reference, however, to the case of *Newsom vs Pryor's Lessees*, cited upon page 90, and also quoted at length upon page 22, of the brief for plaintiff in error, and greatly relied upon in support of its theory, we would say that the facts were in no respect analogous to those here presented. The survey was not a statutory one: the tract was described in the grant by metes and

bounds and not by reference to a plat; it was described as constituting 5000 acres of land *"lying on both sides of the two main forks of Duck river* beginning [at a designated point] and running thence west 894 poles to a stake *crossing the river,"* and thence by certain bounds to the place of beginning. It was a chamber survey.

The court hold that the line running west must cross the river, although it had to be extended 330 poles to reach the station, upon the recognized rule that *the intention of the parties* clearly comprehended the inclusion of the river. **In that case there was no false call for a monument.**

X.

Under its Tenth Point (p. 93), plaintiff in error insists that a meander line can never be a boundary line. We have pointed out the fallacy of this contention in our original brief under subdivision 7, beginning upon page 45.

In support of this position, the plaintiff cites many cases, a few of which may properly be here referred to, to illustrate the general nature of all the citations, and the reasons for their inapplicability to the cases at bar.

The cases of *St. P. & P. R. R. Co. vs. Schurmeier,* 7 Wall., 272 (cited at p. 96), *Hardin vs. Jordan,* 140 U. S., 374 (cited at p. 97), and *Mitchell vs. Smale, idem* 406, (cited on p. 98), were referred to and distinguished in our former brief (pp. 32-3), as was also the case of *Schlosser vs. Cruickshank,* 96 Ia., 424 (cited p. 104), at page 56 of that brief.

In *Forsythe vs. Smale,* Fed. Cas. No. 4950 (cited p. 104), the controversy was precisely the same as the issue in *Mitchell vs. Smale, supra,* the land in controversy being a jut extending beyond the boundary line of a lake which was actually surveyed and meandered, but upon the plat of which the point of land did not appear. The doctrine of the Schurmeier case was applied, and, we think, properly.

Everson vs. City of Waseca, 44 Minn., 247 (cited p. 102), presented the common phase of cases in which the rule of the Schurmeier case is held applicable. The meander line of a lake at a point opposite plaintiff's land varied somewhat, according to the field-notes, from the true water-line. The court held that the patent for

plaintiff's fractional lot carried title to the lake. There, however, the lake existed where shown on the plat; it was actually meandered, and with substantial accuracy, by the surveyor; the courses and distances named in the field-notes varied only slightly from the true meandering of the water's edge; the monument called for by the plat was present and visible, and was shown upon the plat with practical exactness. See opinion of Supreme Court of Minnesota, record, p. 84.

Lamprey vs. State, 52 Minn., 181 (cited upon pp. 103 and 108) concerned the right of the plaintiff, as undisputed riparian proprietor upon an unnavigable lake, ***which had been actually and accurately meandered by the surveyor***, to assert ownership to the bed of the lake under the common law. *Justice Mitchell* took pains to state that the government surveyor had meandered the lake in accordance with the rules and instructions of the department, and had run the meander lines substantially along the margin of the lake. He then said:

> "It will thus be seen that the question presented is, What rights in or to the soil under water does the patentee of land bounded by a meandered inland lake acquire by his patent?"

That was the only matter to which the attention of the court was directed, and the language employed in the opinion was addressed to resolving that question under the facts stated above.

See opinion of Supreme Court of Minnesota, record, p. 84.

Menosha Co. vs. Lawson, 70 Wis., 600 (cited pp. 107, 112), presented a question of boundary. The surveyor bounded his lands upon Fox river, but, at the place in controversy, on account of a small patch of swamp at a bend of the stream, ran his line of meander posts back from a post at the water's edge to the high land behind the swamp.

The parties were owners of adjoining fractional lots, and their dispute arose over the point at which the division line between them,—which (owing to the bend in the river), intersected the stream at an oblique angle—should turn in order to run to the thread of the water, for *it was conceded that the parties were riparian own-*

ers and owned the bed to the middle thread. A glance at the plat accompanying the report in 36 N. W. R., 413, will instantly disclose the situation. If the division line turned at the meander line, which here was back from the water line, and ran, at right angles to the center line of the stream, until it intersected it, a different result would be obtained than if the turn were made farther up stream where the lot-division-line, if extended to the actual water, would intersect the margin of the stream.

The rule in the *Schurmeier case* was applied, the court holding that the river and not the meander line was the boundary.

Counsel for plaintiff in error overlooks, in his deductions from this case, as in others, that the rule announced is only declared applicable to lots "which *are bounded* by a river." The case does not pretend to determine—at it was not called upon to determine—what the rule would be in respect of lots which are *not* bounded by water, the question in the cases at bar.

This authority, it is thus clear, throws no more light on the issue here than do the others referred to.

The court also held, contrary to the contention here, that *the location of the actual shore line is a question of fact, and not one of law,* and was properly investigated by the trial court.

Coburn vs. San Mateo Co., 75 Fed. Rep., 520, 530 (cited p. 107). The plaintiff there was the owner of a certain Mexican grant of land described in his patent as "bordering to the west on the sea." The whole question was, did he own, under the law prevailing in California, the beach between high and low water marks.—in other words, "tide lands?"

Olson vs. Thorndyke, 76 Minn., 399 (cited p. 111), affords no support to the contention of the plaintiff in error, but illustrates the accuracy of the position of the defendants in error. The field-notes of the survey involved in that suit, in defining the courses and distances of the meander line of the Minnesota river, showed a variation from the actual water-line, at one point, of a few rods; but *the river was actually meandered,* the variation was only casual, and the meander line returned shortly to the river's edge again. The land in question was probably one of those slight projections, the exact outline of which would have caused the surveyor unnecessary trouble to define.

The case of *Nicolin vs. Schneiderham,* 37 Minn., 63 (cited

Nevertheless, to guard against unwarranted application of the decision to cases presenting different facts, and to limit it to the case in hand, the court took pains to say:

> "There may be cases in which the error in the government survey is so gross that the purchaser of the fractional, *or supposed fractional,* subdivision of government land will *not* take to the shore of the stream or lake, although the plat of the subdivision calls for such shore as one of the boundaries. It was held that *Whitney vs Detroit Lumber Co.*, 78 Wis., 240, presented such a case. That case is cited in *Lamprey vs. Mead*, 54 Minn., 290. *But there is nothing in the record from which it can be held that this is such a case.*"

See, also opinion Supreme Court of Minnesota, record, p. 85.

The case of *Nicolin vs. Schneiderhan*, 37 Minn., 63 (cited p. 109), presented no reason for departure from the general rule as to arriving at the intention of the parties to the conveyance, and the natural monument was properly held to control the palpably erroneous notation of distance made upon the *plat*. No field-notes were produced, and, so far as appeared, the plat notation of figures was a mere clerical error—not a fiction. Of course, in that case, there could be no possible doubt as to the intent of the grant.

Heald vs. Minisko, 7 N. D., 422 (cited p. 114), disclosed a situation such as the court quoted and applied the rule of the Schurmeier decision. It took pains, however, to point out the distinction existing between cases where it was applicable, and those instances (like the cases at bar) in which the rule could not be controlling at all. It referred to *Lammers vs. Nissen* and *Bissell vs. Fletcher* (referred to upon pp. 51-2 of our former brief) and, stating the facts upon which they rested, said:

> "Each case announces the principle that 'in the surveys of the public lands of the United States the meander lines are generally considered as following the windings of streams; but the question whether they do so or not is a question

> of fact, to be determined by evidence aliunde.' And in each case it was held that, where the meander line did not in fact follow the shore line, the fact that it was designated on the map as a meander line was not conclusive on the government, and did not estop it from claiming the land between such pretended meander line and the shore line. *We think those cases were correctly decided under their facts.* They concede the rule to be well settled that a meander line bordering on the bank of a stream is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction subject to sale."

The remaining cases cited by counsel for plaintiff in error are of the same character as the foregoing, and none of them afford any foundation for the doctrine to which they are cited.

XI.

Under the Eleventh Point (p. 115), the authorities for the defendants in error are reviewed and sought to be distinguished. There is no propriety, of course, in our following, in this brief, the vain attempt. It is noticeable, however, that the case of *Kirwan vs. Murphy*, 189 U. S., 35, is ignored entirely by counsel. It is also noticeable that, with regard to *French-Glenn Livestock Co., vs. Springer*, the attitude assumed heretofore has been abandoned, to the effect that the case, although in point, rested upon no better authority than *Grant vs. Hemphill*, 92 Ia., 218, which counsel deemed to be overruled by *Schlosser vs. Cruickshank*, which view, indeed, they reiterate in another part of their brief in this court (page 135).

The *Springer* case receives further attention, however, since it has been affirmed by this court, upon pages 119-122, where it is stated that it is simply a cross between *Horne vs. Smith* and *Niles vs. Cedar Point Club*. We do not assume to pass upon this proposition, but we do assert that, if that case were rightly decided, the judgments now before this court must be affirmed, for there is no

distinction which can be drawn between the facts as presented by the two records. This will appear by reference to the record of the case in this court, as well as by reference to pages 13, 15-16 of our former brief.

In regard to the case of *Granger vs. Swart*, 10 Fed. Cas., p. 961, which was a decision by *Mr. Justice Miller* sitting as Circuit Justice, counsel pass severe judgment upon the learned judge named (pp. 125-130), and strive to overcome the authority of most of the decisions cited by defendants in error, for the reason that "almost every one has its root in the manifestly erroneous charge" delivered in the case referred to. It is enough to say that the principles enunciated by *Mr. Justice Miller* in that case have become the acknowledged law of many states and have been promulgated by this court in *Horne vs. Smith*, *Niles vs. Cedar Point Club*, and *French-Glenn Livestock Co., vs Springer*. The only adverse criticism of the case which has ever come to our attention has been in the briefs of counsel for plaintiff in error.

As stated by *Mr. Justice Brewer*, (*Horne vs. Smith*, 159 U. S., 45), "cases of this nature are naturally few in number." Yet counsel for plaintiff in error would have it that they are as plentiful as blackberries, and that all of them with the exception of *Granger vs. Swart* and those cases (which are the "few" alluded to by *Mr. Justice Brewer*) which have followed its "indefensible assumption," support their contention.

Every material contention of the plaintiff in error in these cases was urged in this court in the brief filed by the plaintiff in error in the case of *French-Glenn Livestock Co., vs Springer*. It was there, as here, insisted:

That monuments control absolutely and in all cases over courses distances and quantity (pp. 17, 23, 24-5);

That the official survey of the lake, and the plats and maps made thereunder, showing land to abut upon a meander line, conclusively establish the lake depicted upon the plat as the actual boundary of the land (pp. 10-13);

That the right of access, and the superior value of a water frontage, cannot be denied to a purchaser buying in reliance upon a plat showing such frontage (pp. 27-8);

That the relief, if any, against the extension of such grant to the actual lake, must be sought in equity (pp. 13, 14);

That the fraud or error of a surveyor is an immaterial circumstance (pp. 25-26);

That the fact of a discrepancy of a mile or more between the meander line and the actual lake is unimportant, and in no manner precludes the extension of the grant to the lake, wherever it may be found (pp. 20-24);

That a meander line is not a boundary, but demonstrates that the water purported to be portrayed upon the plat is the true boundary (pp. 16, 17); and

That the government is estopped by acts of its surveyors, whether they are erroneous or fraudulent (pp. 27-8).

And the same attempts were made to distinguish, if not to impeach, the doctrine of the authorities relied upon by the defendants in error here (pp. 29-31).

In short, no phase of these cases as now presented has not been carefully and patiently examined and decided by this court in the suit referred to and in *Kirwan vs. Murphy*, 189 U. S., 35.

The answer to all the contentions of the plaintiff in error is found in the opinions of this court in those cases.

Under that answer the fundamental proposition of plaintiff in error, that "the case is governed by the elementary rule that monuments prevail over courses, distances and quantities," cannot be sustained, and it is submitted that the conclusion of the Supreme Court of Minnesota, must be affirmed, as it it stated upon page 86 of the record in these words:

> "This case, then, is one where the call for the natural monument, the lake, must be disregarded, for the admitted facts show that it is an impossible call, and that if it is rejected the courses and distances and the meander line will exactly close and give to the plaintiff the precise quantity of land bought from the government and paid for. It falls within the rule, that, a meander line is not, as a general proposition, a boundary line, yet the boundaries of fractional lots will not be indefinitely extended

where they appear by the government plat to abut on a body of water which in fact has never existed at substantially the place indicated on the plat. In such exceptional cases, the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey and be held to be the boundary line of the land it delimits."

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